DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-161
Title: Christine Armour, et al., Petitioners
v.
City of Indianapolis, Indiana, et al.
Docketed: August 9, 2011
Lower Ct: Supreme Court of Indiana
Case Nos.: (49S02-1007-CV-402)
Decision Date: May 10, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 8 2011	Petition for a writ of certiorari filed. (Response due September 8, 2011)
Aug 22 2011	Waiver of right of respondents City of Indianapolis, Indiana, et al. to respond filed.
Aug 31 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 8 2011	Brief amicus curiae of Tax Foundation filed. (Distributed)
Sep 8 2011	Brief amicus curiae of National Taxpayers Union filed. (Distributed)
Sep 14 2011	Response Requested . (Due October 14, 2011)
Oct 14 2011	Brief of respondents City of Indianapolis, Indiana, et al. in opposition filed.
Oct 25 2011	Reply of petitioners Christine Armour, et al. filed.
Oct 26 2011	DISTRIBUTED for Conference of November 10, 2011.
Nov 14 2011	Petition GRANTED.
Dec 19 2011	SET FOR ARGUMENT ON Wednesday, February 29, 2012.
Dec 29 2011	Joint appendix filed. (Statement of costs filed)
Dec 29 2011	Brief of petitioners Christine Armour, et al. filed.
Jan 3 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jan 5 2012	Brief amicus curiae of National Taxpayers Union filed.
Jan 5 2012	Brief amicus curiae of National Association of Home Builders filed.
Jan 5 2012	Brief amicus curiae of Institute for Justice filed.
Jan 5 2012	Brief amicus curiae of Tax Foundation filed.
Jan 9 2012	Record received from the Indiana Supreme Court
Jan 10 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Jan 12 2012	CIRCULATED
Jan 30 2012	Brief of respondents City of Indianapolis, Indiana, et al. filed. (Distributed)
Feb 6 2012	Brief amicus curiae of International Municipal Lawyers Association filed. (Distributed)

Feb 6 2012	Brief amici curiae of International City/County Management Association, et al. filed. (Distributed)
Feb 21 2012	Reply of petitioners Christine Armour, et al. filed. (Distributed)
Feb 29 2012	Argued. For petitioners: Mark T. Stancil, Washington, D. C. For respondents: Paul D. Clement, Washington, D. C.
Jun 4 2012	Adjudged to be AFFIRMED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Thomas, Ginsburg, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Alito, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

SUPREME COURT, U.S.
FILED
AUG 8 - 20
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are the owners of 31 residential real estate parcels in Indianapolis, Indiana, who were assessed approximately $9,000 each for connection to a public sewer system. Petitioners paid their assessments in full, while their neighbors—owners of approximately 150 other parcels—elected to pay in monthly installments over 10, 20, or 30 years. Shortly thereafter, the City adopted a new assessment scheme that vastly reduced each taxpayer's burden. The City forgave the outstanding balances of those taxpayers who were paying in installments, but it refused to refund payments made by those who had already paid in full.

The Indiana Supreme Court—in conflict with decisions of a federal court holding the very same conduct unconstitutional and other state high courts—held that this action did not violate the Equal Protection Clause, even though it allowed the City to retain from each petitioner 30 times as much in assessed taxes as identically situated owners paid. In so holding, the 3-2 majority of the Indiana Supreme Court dismissed this Court's unanimous decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), as "narrowed to its facts." App. 28a. The question presented is:

> Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

RULE 14.1(B) STATEMENT

Petitioners are Christine Armour; David A. Bird; Alvera C. Buker; Joseph and Rozzetta Cumberland; Alice J. Detzler; James and Renate Donahue; Kenneth J. and Mary Jane Eiler; Sandra Kay Hevron; David A. and Heather R. Fellabaum; Nancy Lee Gahl; David M. Gibson; Ingeborg Haesloop; Robert and June Holt; Frank and Jeanne A. Johnson; Edward J. and Ericka M. Kelly; Leonard and Colleen Kirksey; Carlos and Katrina Kreamer; Frank and Bettye Jo Lloyd; William H. and Sue Ellen Main, Jr.; Wilma Marley; Geoffrey and Dinah Michels; Norma Jean and Paul Morgan; Zora Nathan; Frank and Sharon Neese; Donnie Patton; Viesturs and Carolyn Purvlicis; Susan Moe; Evelyn Rogers; Clifford Short; Louis and Linda Urbancic; and Mary Williams.

Respondents are the City of Indianapolis; Greg Ballard, Mayor of the City of Indianapolis; Indianapolis Department of Public Works; Indianapolis Board of Public Works; Jeff Spalding, Controller of the City of Indianapolis; Indianapolis Office of Finance and Management; and Billie J. Breaux, Marion County Auditor.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-39a) is reported at 946 N.E.2d 553. The opinion of the Indiana Supreme Court granting transfer of the opinion of the Court of Appeals of Indiana (App. 40a) is reported at 940 N.E.2d 821. The opinion of the Court of Appeals of Indiana (App. 41a-78a) is reported at 918 N.E.2d 401. The order of the Marion Superior Court granting summary judgment for petitioners (App. 80a-84a) is not reported.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on May 10, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION, STATUTE, AND ORDINANCES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

Relevant portions of Resolution 101 of the Indianapolis Board of Public Works; General Ordinance No. 107 of the City-County Council of Indianapolis-Marion County; and Indiana's Barrett Law, Ind. Code § 36-9-39-15, are reproduced in the appendix to this petition. App. 85a-91a.

STATEMENT

Petitioners are the owners of 31 residential real estate parcels in the Northern Estates subdivision in Indianapolis, Indiana. App. 4a. In April 2001, the

City notified petitioners that their properties would be part of the Brisbane/Manning Barrett Law Sanitary Sewers Project, which sought to connect properties operating on individual septic systems to the municipal sewer. App. 3a. The Indianapolis Board of Public Works, following existing regulatory procedures, approved a tax assessment of $9,278 for each of the approximately 180 parcels in the project. App. 3a-4a.

The tax was imposed pursuant to Indiana's Barrett Law, Ind. Code § 36-9-39-15, which required such assessments to be "apportioned equally among all abutting lands or lots." App. 85a. The affected owners were given the option of paying the assessment in full, or paying the amount in monthly installments over 10, 20, or 30 years (plus a 3.5% annual interest rate). Most owners chose one of the installment plans: 68 opted for the 30-year plan (paying $25.77 per month); 27 opted for the 20-year plan (paying $38.66 per month); and 47 opted for the 10-year plan (paying $77.27 per month). The owners of 31 of the parcels—petitioners here—immediately paid their entire assessments in full.[1]

On October 31, 2005, the City-County Council of Indianapolis adopted a new method of financing this sewer project. The Council passed Ordinance No. 107, which abandoned the Barrett Law as a means of funding new sewer improvements. In its place, the ordinance imposed a connection fee of $2,500 per dwelling for new connections to the sanitary sewer system. App. 88a.

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[1] One of the petitioners, Ms. Buker, had been assessed only one-half of the parcel fee and therefore paid $4,639. Her reduced assessment was the result of a previous sewer hookup that no longer met City standards. App. 3a n.2.

The Board of Public Works then considered how to dispose of the assessments imposed for this project under the Barrett Law. On December 7, 2005, the Board passed Resolution 101, which forgave "all assessment amounts . . . established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing *from the date of November 1, 2005* forward to the Department of Public Works via the Barrett Law Assessment Bureau." App. 90a (emphasis added). The Board thus eliminated the outstanding balances owed by 142 owners who had chosen the installment payment plan: Those on the 30-year plan had paid only $309.27 (3.3%) toward the $9,278.00 assessment; those on the 20-year plan had paid only $463.90 (5%); and those on the 10-year plan had paid only $927.80 (10%).

Petitioners, however, had already paid 100% of their assessments. App. 4a, 69a. On February 4, 2006, petitioners requested a refund of their lump-sum payments equal to the assessments forgiven for the installment taxpayers. App. 48a. On March 8, 2006, the City rejected the request, refusing to offer petitioners any refund. App. 48a-49a.

On July 22, 2007, petitioners filed this lawsuit in Indiana state court against the City of Indianapolis and related entities and officials (respondents here). Petitioners asserted, among other things, a claim under 42 U.S.C. § 1983, alleging that the City's arbitrary classification of taxpayers, which treated those similarly situated differently, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. App. 7a, 50a.

The parties later filed cross-motions for summary judgment. Petitioners contended that respondents

lacked a rational basis for refusing to award petitioners the same tax forgiveness given to their similarly situated neighbors who had chosen to pay under the installment plan. The City contended that it had a rational basis for refusing to refund the excess assessments collected from petitioners. After a hearing, the trial court granted petitioners' motion for summary judgment and denied the City's cross-motion. The court entered judgment in favor of each petitioner and against the City and directed the City to pay $273,391.63 in refunds plus reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988, of $105,153.00 and expenses of $2,369.53. App. 84a.

Respondents appealed. On December 18, 2009, the Court of Appeals of Indiana affirmed the trial court's grant of summary judgment on petitioners' Equal Protection claim and remanded with instructions to refund to petitioners an amount that would place them "on equal footing with their similarly situated neighbors who benefited from the City's disparate treatment." App. 76a-77a. Noting that "the parties agree that the material facts are undisputed," App. 52a, the court of appeals explained that the case turned on "the application of various United States Supreme Court cases to this appeal," App. 56a-57a. "The most relevant of those cases," the court concluded, "is *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989)." App. 57a. That case likewise concerned disparities in real property tax assessments. In an opinion by Chief Justice Rehnquist, this Court unanimously held that "'*the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.*'" App. 58a (quoting *Allegheny Pittsburgh*, 488 U.S. at 343) (emphasis added by

court of appeals). The court of appeals noted that the disparity deemed constitutionally impermissible in *Allegheny Pittsburgh* caused the petitioners to pay "'roughly 8 to 35 times more than'" the owners of "'comparable neighboring property.'" *Ibid.* (quoting 488 U.S. at 344).

The court of appeals next observed that this Court "has not specifically addressed whether a municipality contravenes the Equal Protection Clause when it forgives an outstanding assessment owed by some property owners while, at the same time, it refuses to refund an equivalent amount to similarly situated property owners who have already paid the same assessment in full." App. 58a-59a. It determined, however, that "there are at least three state supreme court cases directly on point." App. 59a. In *Armco Steel Corp.* v. *Department of the Treasury*, 358 N.W.2d 839 (Mich. 1984), the court explained, "the Supreme Court of Michigan held unanimously that a State agency 'failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their . . . assessments . . . and those who did not.'" *Ibid.* (quoting 358 N.W.2d at 843). "The Supreme Court of Florida and the Supreme Court of Kansas," the court further observed, "have reached similar holdings on comparable facts involving special tax concessions and the forgiveness of unpaid tax liabilities." *Ibid.* (citing *State ex rel. Stephan* v. *Parrish*, 891 P.2d 445, 457 (Kan. 1995); *Richey* v. *Wells*, 166 So. 817, 819 (Fla. 1936)).

The court of appeals next examined respondents' arguments that their refusal to grant petitioners a refund satisfied the requirements of rational-basis scrutiny. The court rejected respondents' assertion that petitioners were not similarly situated to those

taxpayers whose assessments were forgiven. "[T]he relevant classification for equal protection purposes," the court explained, "is all the property owners in the group subject to the same July 2004 Barrett Law assessment." App. 62a (citing *Allegheny Pittsburgh*, 488 U.S. at 346; *Armco Steel*, 358 N.W.2d at 843). Were it otherwise, officials could simply "re-defin[e] the class" to eliminate an equal protection violation. *Ibid.* The court also dismissed respondents' claim that petitioners' disparate treatment was the result of a desire to relieve low-income families of a tax burden: "[T]he City has wholly failed to show that the property owners who chose to pay in installments are in any different income class than [petitioners], who paid in a single lump sum." App. 63a.

The court of appeals then determined that the disparate treatment did not bear a rational relationship to a legitimate government interest. Resolution 101, the court noted, declared that the purpose of abandoning the Barrett Law assessment method was to serve the "best interests of middle- to lower-income property owners." App. 66a. But that decision was not the decision that gave rise to equal-protection concerns; "[r]ather, [petitioners] challenge whether the City can apportion costs equally among similarly situated property owners and then forgive outstanding assessments on an arbitrary date without refunding an equivalent amount to those property owners who had already paid the assessment in full as of that date." App. 67a. "[N]either the Resolution's findings nor its forgiveness provision," the court determined, addresses "the City's decision not to issue a refund to [petitioners]." *Ibid.* Respondents had demonstrated "no nexus" between the abandonment of the Barrett Law assessment and the refusal to issue a refund. *Ibid.*

While "only 'rough equality'" among taxpayers is required, the court concluded, the short period of time between the 2004 assessment and the 2005 abandonment had produced gross, constitutionally intolerable disparities. Petitioners "have paid from ten to thirty times more than each of their similarly situated neighbors." App. 68a (citing *Allegheny Pittsburgh*, 488 U.S. at 344). Moreover, respondents' refusal to issue a refund to petitioners violated the latter's "'legitimate expectation and reasonable reliance' interests." App. 69a-70a (quoting *Nordlinger* v. *Hahn*, 505 U.S. 1, 13 (1992)).

After the court of appeals denied rehearing, respondents successfully petitioned for transfer to the Indiana Supreme Court. App. 40a. That court reversed in a closely divided, 3-2 decision. Writing for the majority, Justice Sullivan concluded that respondents had a legitimate interest in the administrative benefits of "simplifying sanitary sewer funding" by forgiving outstanding Barrett Law assessments, and drawing a clear "line" for moving to the new funding system. App. 18a. Noting that the purpose of abandoning the Barrett Law was to aid middle- and lower-income taxpayers, the court further determined that "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." App. 16a. But the court failed to respond directly to the court of appeals' contention that that was Resolution 101's stated assertion for abandoning the Barrett Law system; the resolution did not contain a reason justifying the separate decision not to issue an equivalent refund to petitioners.

The court did, however, opine that "the decision not to issue refunds to those who had already paid

implicates another legitimate interest—preservation of limited resources." App. 18a-19a. Indeed, the court explicitly embraced the notion that respondents were justified in refusing to pay simply because they had already spent the money: "The City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessment." App. 19a.

The court then stated that petitioners had "[i]n essence" presented a "class-of-one" equal protection theory, "because they were treated differently than the other residents of Northern Estates." App. 23a The court held, however, "that this is not a class-of-one case" because Resolution 101 "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances." App. 24a.

The court next examined this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*. "The effects of the tax schemes in *Allegheny Pittsburgh* and *Nordlinger* were the same," inasmuch as both "resulted in gross disparities in the tax burden of similarly situated property owners." App. 26a-27a. The Court struck down the former scheme but upheld the latter, the court reasoned, because *Allegheny Pittsburgh* "was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was" legitimate. App. 27a-28a. The court dismissed *Allegheny Pittsburgh* as "a class-of-one case." App. 28a (citing *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) (per curiam)). "[A]t a minimum," the court declared, "*Allegheny Pittsburgh* has essentially been narrowed to its facts and stands as a 'rare case' where the means did not rationally further the

government's legitimate purpose." *Ibid.* (quoting *Nordlinger*, 505 U.S. at 16).

Finally, the court turned to the conflicting state supreme court cases on which the court of appeals had relied. The court disagreed with *Armco Steel*'s "articulation of equal protection law," and also attempted to distinguish it "on its facts" because that case involved "a sense of foul play" in the initial tax assessment at issue. App. 30a. The court dismissed other state decisions as "unpersuasive"—noting that some had been based on state constitutional grounds—and singled out the Florida Supreme Court's decision in *Richey* as "stating only that it was the 'view' of the majority opinion's author." App. 31a-32a. The court also sought to distinguish those decisions because they involved relief granted to delinquent taxpayers, whereas here the property owners granted relief from their Barrett Law assessments were operating under a government-sponsored installment plan. App. 32a-33a. The court acknowledged that a federal district court considering a challenge to Resolution 101 brought by other plaintiffs had reached a contrary result. App. 34a n.22.

Justice Rucker, joined by Justice Dickson, dissented. The dissent echoed the court of appeals' observation that the various reasons given for abandoning the Barrett Law assessment scheme do "nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments." App. 38a. More particularly, "[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners. App. 39a. "In my view," Justice Rucker concluded, "this disconnect demonstrates that the classification fails to have a 'fair and substantial

relation' to the statutory objective." *Ibid.* (citing *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959)).

REASONS FOR GRANTING THE PETITION

The "core concern of the Equal Protection Clause" is to act "as a shield against arbitrary classifications." *Engquist* v. *Oregon Dept. of Agric.*, 553 U.S. 591, 598 (2008) (per curiam). Here, petitioners were denied thousands of dollars in tax benefits awarded to their identically situated neighbors solely because petitioners had paid their tax assessments in full. That is the epitome of arbitrariness.

The Indiana Supreme Court upheld that distinction as rationally related to legitimate government interests in "administrative" convenience and—more transparently still—simply "preserving . . . limited resources." App. 19a. That holding squarely conflicts with decisions by four state high courts, as well as with a recent decision by an Indiana federal district court. The decision below is also wrong: It improperly confines this Court's unanimous holding in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), "to its facts," App. 28a, and wrongly accepts respondents' assertions that it is simply easier and cheaper to keep petitioners' money than to return it. Even under rational-basis review, that is no answer to an equal protection challenge. The issue presented is of widespread significance. Accepting "limited resources" as a justification for blatantly discriminatory taxation throws open the door to any number of pernicious practices. And upholding this practice will have the perverse effect of limiting authorities' collection options. This Court's review is urgently needed.

I. The Indiana Supreme Court's Decision Squarely Conflicts With Decisions Of Other State Supreme Courts And The Federal District Court In Indiana

A. Four State Supreme Courts Have Held That Discriminatory Tax-Forgiveness Schemes Violate The Equal Protection Clause

The Indiana Supreme Court's decision directly conflicts with decisions of four other state supreme courts. Those courts have held that the Equal Protection Clause prohibits tax-forgiveness measures that differentiate between taxpayers who promptly paid their tax assessments in full and those who delayed full payment.

In *Armco Steel Corp.* v. *Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), the Supreme Court of Michigan struck down on federal equal-protection grounds a discriminatory taxation scheme materially indistinguishable from the one at issue here. The plaintiffs in *Armco Steel* had paid corporate franchise fees pursuant to an auditing procedure that was subsequently invalidated in a series of court decisions. In response to those decisions, the state tax division canceled corporate tax liabilities that remained unpaid, but refused to grant refunds to taxpayers who had paid their assessments in full.

Observing that the two groups of taxpayers were similarly situated, the court explained that the State had "failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their deficiency assessments following unauthorized audits and recomputations, and those who did not." *Id.* at 843. The court therefore held that the State's disparate treatment of

the two groups of taxpayers violated the Equal Protection Clause, which precludes such "persistent discrimination between two groups of taxpayers who are in reality but one class." *Id.* at 844.

Other state supreme courts agree. In *Perk* v. *City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969), the court held that a law authorizing tax forgiveness for cities that failed to pay property taxes but not for those that already paid such taxes violated the Fourteenth Amendment. In *Richey* v. *Wells*, 166 So. 817, 819 (Fla. 1936), the court ruled that the Equal Protection Clause prohibits States from providing tax concessions to delinquent taxpayers unless "the same benefits" are provided to "those who have already paid their current taxes due." In *State ex rel. Stephan* v. *Parrish*, 891 P.2d 445, 457 (Kan. 1995), the court invalidated, under a state constitutional provision "substantially identical" to and given the same effect as the Fourteenth Amendment's Equal Protection Clause, a statute that waived outstanding tax obligations without conferring an equivalent privilege to timely taxpayers.

The teaching of these cases is clear. A state or municipal taxing authority cannot, consistent with the Equal Protection Clause, implement a discriminatory tax-forgiveness mechanism that punishes taxpayers who pay their taxes in full and rewards taxpayers who delay payment.[2]

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[2] Numerous state supreme courts have held it to be unconstitutional as a matter of state constitutional law to deny benefits to taxpayers who promptly pay their taxes while granting such benefits to those who do not. See *Snow's Mobile Homes, Inc.* v. *Morgan*. 494 P.2d 216, 219 (Wash. 1972); *State ex rel. Tharel* v. *Bd. of County Comm'rs*, 107 P.2d 542, 548-49 (Okla. 1940); *State ex rel. Hostetter* v. *Hunt*, 9 N.E.2d 676, 683

The Indiana Supreme Court reached the opposite conclusion in this case. Like the tax-forgiveness measures at issue in *Armco Steel*, *Richey*, *Perk*, and *Parrish*, Resolution 101 divides taxpayers into two groups: those, like petitioners, who timely paid their tax assessments, and those who delayed full payment. See *Armco Steel*, 358 N.W.2d at 844 ("The only distinction existing between [the two groups of taxpayers] is that one group paid their deficiencies while the other group did not."). And, like the taxation schemes struck down by the other state supreme courts, Resolution 101 treats those identically situated groups dramatically differently, erasing the tax debts of those who delayed payment, while "refus[ing] to grant refunds to those . . . taxpayers who had paid their assessments and later sought repayment." *Id.* at 841. As a consequence of that disparate treatment, the plaintiffs paid up to 30 times as much in tax assessments as did their neighbors who elected to pay their taxes in installments. The Indiana Supreme Court nevertheless concluded that the City's grossly discriminatory taxation regime did not run afoul of the Equal Protection Clause.

Although the Indiana Supreme Court attempted to sidestep the conflict it created, its efforts to do so are wholly unconvincing. The Indiana Supreme Court first argued that *Armco Steel* failed to "consider whether there was a legitimate purpose" for treating similarly situated taxpayers differently "and whether the means used were rationally related to furthering such a purpose." App. 30a. That point is a ground for *disagreement*, not a distinction, and therefore would do nothing to lessen the square conflict even if it were

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(Ohio 1937); *State ex rel. Matteson* v. *Luecke*, 260 N.W. 206, 208 (Minn. 1935).

true. But it is not true in any event. The Michigan Supreme Court expressly concluded in *Armco Steel* that the State had "failed to suggest any persuasive rational basis justifying its disparate treatment" of the two classes of taxpayers and that the State's disparate treatment of those groups possessed no "*reasonable relationship* to the object of the classification." 358 N.W.2d at 843-44 (emphasis added).

The Indiana Supreme Court next attempted to distinguish *Armco Steel* on the ground that the initial fees paid by the taxpayers in that case were subsequently held to be unlawful, whereas the plaintiffs here do not challenge the validity of the Barrett Law assessment. App. 30a-31a. But, as the Michigan Supreme Court itself stated in *Armco Steel*, the legality of the original tax assessment is a "*non sequitur*," 358 N.W.2d at 843: The constitutional question decided in *Armco Steel* was whether the government had a rational basis to distinguish between early taxpayers and non-payers—not whether the government correctly charged the early payers in the first place. That is precisely the question presented in this case, and the fact that the City chose (and was not forced) to abandon the Barrett Law assessment regime does not determine the constitutionality of its separate decision to waive arbitrarily the debts of some taxpayers but not others.[3]

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[3] The Indiana Supreme Court also suggested that the Florida Supreme Court's decision in *Richey* was distinguishable because that case involved disparate treatment of delinquent taxpayers and those who paid their taxes on time. App. 32a. Again, however, that argument misses the point: The question is whether the State can punish taxpayers who paid their assessments on time while rewarding those who did not. *Richey*, like the other state supreme court decisions to address

B. The Federal District Court In Indiana Held That The City's Discriminatory Tax Treatment Under Resolution 101 Violates The Equal Protection Clause

As the Indiana Supreme Court acknowledged, App. 34a n.22, its decision also directly conflicts with the recent decision in *Cox* v. *City of Indianapolis*, 2010 WL 2484620 (S.D. Ind. June 14, 2010). In that case, the district court addressed the exact same question as did the Indiana Supreme Court—whether Resolution 101 violates the Equal Protection Clause as applied to plaintiffs who paid Barrett Law assessments—and came to the opposite conclusion.

The plaintiffs in *Cox* were a certified class of Indianapolis property owners who, like petitioners here, had paid in full their Barrett Law assessments for other municipal projects. Because they paid more than did their similarly situated neighbors whose assessments were forgiven, the plaintiffs alleged that Resolution 101 violated their rights under the Equal Protection Clause.[4] Applying rational-basis review, the district court agreed.

"'[F]or the purposes of forgiving an outstanding tax debt," the court explained, "a state authority acts arbitrarily when it differentiates between similarly

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that question, held that such blatant discrimination among similarly situated taxpayers squarely violates the Equal Protection Clause. Indeed, the Indiana Supreme Court admitted that the fact that the taxpayers rewarded by the taxation scheme in *Richey* were delinquent was irrelevant to the constitutional question decided. App. 33a.

[4] The plaintiffs in *Cox* originally filed suit in state court, but the City removed the case to federal court when the plaintiffs amended their complaint to include a federal equal-protection claim. *Cox*, 2010 WL 2484620, at * 2.

situated, and identically assessed, taxpayers solely on the basis of those who have fully paid their debt and those who have not.'" *Cox*, 2010 WL 2484620, at *4 (quoting App. 61a). In reaching that conclusion, the district court relied on this Court's unanimous decision in *Allegheny Pittsburgh*, which held that the Equal Protection Clause requires "a rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh*, 488 U.S. at 343. Contrary to that constitutional requirement, the "'City did not take any steps to treat the [plaintiffs] in a manner even roughly equivalent to their similarly situated neighbors.'" *Cox*, 2010 WL 2484620, at *6 (quoting App. 74a).

The district court considered—and squarely rejected—the City's putative rationales for implementing Resolution 101, including the City's alleged interests in minimizing its own administrative costs and reducing the financial burdens on lower-income families. Those "'attenuated'" justifications, the district court held, do not withstand rational-basis scrutiny because they "'bear no rational relationship to the City's exclusion of the [Plaintiffs] from the forgiveness provision.'" *Id.* at *6, *7 (quoting App. 70a, 75a). Accordingly, the district court held that "the City's differential tax treatment of the [Plaintiffs] violates the Equal Protection Clause." *Id.* at *7 (quoting App. 75a).

The Indiana Supreme Court could not distinguish *Cox*, which, after all, addressed the constitutionality of the very same resolution at issue in this case. Instead, the Indiana Supreme Court rejected the district court's analysis on the ground that the federal court relied on the "now-vacated opinion of [the Indiana] Court of Appeals in this case." App. 34a n.22. The district court, in turn, declined to alter its

judgment in response to the Indiana Supreme Court's decision, noting that decisions of that court are "only persuasive authority on matters of federal law." *Cox* v. *City of Indianapolis*, 2011 WL 2446702, at *2 n.1 (S.D. Ind. June 15, 2011) (Entry On The Issue Of Damages).[5]

The Indiana Supreme Court's decision therefore not only conflicts with the decisions of other state supreme courts, but also creates an intractable federal-state split within Indiana on the precise question presented by this case. It is difficult to imagine a more intolerable conflict than one pitting a state supreme court against a federal court in the same State on an issue of federal constitutional law. See, *e.g.*, *Johnson* v. *California*, 545 U.S. 162, 163 (2005). This Court's review is urgently needed to resolve that "significant" conflict. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985).

II. The Decision Below Is Erroneous

Twelve judges have addressed the practice at issue here; nine agree that it violates the Equal Protection Clause.[6] The three-justice majority below stands alone in holding that a taxpayer's having paid her tax bill is a permissible basis upon which to deny her relief granted to those who are otherwise identically situated. The decision below is wrong.

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[5] The district court has deferred ruling on attorneys' fees and on a state statutory issue unrelated to the federal equal-protection claim. See *Cox* v. *City of Indianapolis*, No. 09-435, Minute Order Regarding Status Conference Held June 16, 2011 (S.D. Ind. June 16, 2011).

[6] Those twelve judges are the state trial judge, three court of appeals judges, and five Indiana Supreme Court Justices in this action, plus the magistrate judge and two federal district judges involved in the federal class action.

A. This case does not call into question respondents' decisions to abandon the Barrett Law and to forgive tax assessments under that law. It is, of course, entirely rational to conclude that the burdens of a taxation scheme are too onerous, and that prior assessments under that scheme therefore should be eliminated. At issue here is respondents' separate decision to *withhold* that very same relief from petitioners, simply because they had already paid their tax bills in full. Accordingly, respondents' assertions that their actions were justified because the Barrett Law was unfair to lower- and middle-income taxpayers are beside the point. Furthermore, many of those taxpayers who elected to pay the assessments in full are senior citizens with little fixed income (but with assets sufficient to cover the assessments). The burden of the City's arbitrary taxation scheme therefore fell disproportionately on such senior citizens. It is not only perverse, but also directly contrary to the City's stated reason for abandoning the Barrett Law regime in the first place, to punish such taxpayers, who simply chose to pay for their assessments by, in effect, borrowing money from themselves instead of borrowing from the City.

The remaining justifications embraced by the Indiana Supreme Court—that refusing to issue refunds "preserv[ed] limited resources" or offered "administrative" advantages—do serious violence to equal-protection principles. App. 11a. "Preservation of limited resources" is just a nice way of saying that the City wanted to keep the money. But accepting that rationale would eliminate any equal-protection review of even the most egregiously disparate tax treatment claims: Every taxing authority could (and will) claim that it needs the money, which is presumably why it imposed certain taxes in the first

place or refused to refund them. Suppose, for example, that a government imposed greater tax burdens on redheads than on brunettes, or denied refunds to redheads while giving them to similarly situated brunettes. The scheme is no less arbitrary because the result would be to increase the government's coffers. Yet the "resource preservation" rationale accepted below permits precisely that bizarre result.

The Indiana Supreme Court relied on several of this Court's welfare-benefit cases in claiming that "resource preservation" is a constitutionally adequate justification for disparate taxation. App. 11a-12a (citing *Bowen* v. *Gilliard*, 483 U.S. 587, 599 (1987); *Lyng* v. *Castillo*, 477 U.S. 635 (1986); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972)). None can bear such weight.

Those decisions recognized that limited resources require governments to draw distinctions among would-be recipients of government benefits, but none accepted that practical reality as full justification for any classification that followed. Rather, the Court examined whether the distinctions between classes were rationally related to some legitimate governmental interest *other than* just saving the government's money. In *Gilliard*, the Court held that limiting benefits to families receiving child support from noncustodial parents furthered "the Government's separate interest in distributing benefits among competing needy families in a fair way" because those receiving no outside child support were in greater need. 483 U.S. at 599. In *Castillo*, the Court held that distinguishing between households comprising close relatives and those comprising more distant relatives likely reflected different eating and purchasing patterns for such households and reduced

the risk of mistaken or intentionally misstated claims. 477 U.S. at 642. In *Jefferson*, the Court wrote that "the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living." 406 U.S. at 549. If saving money were a fully satisfactory justification for disparate treatment, the Court could have ended its analysis with the observation that the government saved money in each case, and would not have needed to analyze the additional justifications it cited.

The "administrative convenience" justification fares no better. Once again, recall that the constitutionally relevant action is not the decision to forgo the collection of Barrett Law assessments over a 10-, 20-, or 30-year period, but the refusal to issue refunds to those taxpayers who had paid in full. Petitioners sought a refund equal to the difference of the total amount they paid and the amount paid by taxpayers under the 30-year installment plan.[7] That required only simple arithmetic based on entirely undisputed facts. Surely a government cannot justify its refusal to rectify disparate tax burdens simply because doing so would require an official to do such basic math and then issue a refund in the appropriate amount. Were it otherwise, then virtually any disparate tax treatment could be justified simply by stating that a remedy would require some additional effort to calculate. Indeed, it is difficult to imagine a case in which the "administrative burdens" could be lighter: Not a single fact or figure is disputed; all that remains is to cut petitioners a check.

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[7] The 30-year plan was the most popular. Substantially more homeowners (68) chose the 30-year plan than the 20-year plan (27) or the 10-year plan (47). App. 4a.

B. The decision below also erred in its reading of this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*.

Allegheny Pittsburgh concerned real-property assessments in Webster County, West Virginia. 488 U.S. at 338. West Virginia's constitution required property taxes to be assessed "in proportion to [the property's] value," *ibid.*, but Webster County's assessor had a practice of assessing recently sold property at its full sales price while making only modest adjustments to property that had not been sold. Over time, substantially identical properties were assessed at vastly different levels—recently sold properties were valued (and therefore taxed) between 8 and 35 times higher.

This Court unanimously held that this practice violated the Equal Protection Clause. The Court first recognized that, as here, the petitioners' "complaint is a comparative one"—the question was whether their assessments were too high not in the abstract but *relative to their neighbors'*. 488 U.S. at 342. The Court then held that the Equal Protection Clause requires "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," *id.* at 343, and it determined that the gross disparities produced by the county's system failed that test. The disparities at issue here are equally offensive: Petitioner ended up paying between 10 and 30 times the tax charged to their neighbors. *Allegheny Pittsburgh* also rejected the county's assertion that the policy reflected a rational distinction among taxpayers, noting that state law "has not drawn such a distinction." *Id.* at 345. So too here—the Indiana statute under which petitioners were taxed expressly required equal taxation for petitioners and other Northern Estates property

owners. App. 85a. There is no evidence that Indiana law varied liability based on the time of payment.

The majority below also misunderstood this Court's decision in *Nordlinger*. *Nordlinger* upheld Proposition 13, a California ballot initiative that limited real property tax assessment increases unless the property had changed ownership. 505 U.S. at 5. Critical to the Court's analysis was the fact that California's voters had declared a statewide policy *against* uniform property taxation—that was the point of the ballot initiative. Here, it bears repeating, Indiana law states that taxation shall be uniform; respondents cannot plausibly claim that the disparate treatment visited on petitioners furthers the State's tax policy. This Court has since reaffirmed the significance of background legal principles against which disparate treatment is measured. See *Engquist*, 553 U.S. at 602. ("What seems to have been significant in [*Village of Willowbrook* v.] *Olech*[, 528 U.S. 562 (2000)] and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed.").

Nordlinger also repeatedly emphasized the need to protect "legitimate expectation and reliance interests." 505 U.S. at 13. Under the scheme at issue there, existing property owners had a legitimate expectation interest in avoiding spiraling tax bills based on unrealized appreciation in the value of their real estate, while new purchasers entered into transactions fully aware of the ensuing tax burdens. Here, by contrast, petitioners had a legitimate expectation that they would be taxed only equally with their neighbors, because state law said as much. And the installment-plan taxpayers certainly had no

reliance interest in being treated *more favorably* than petitioners.

Moreover, the majority in *Nordlinger* explicitly rejected the contention that its decision could not be squared with the unanimous decision in *Allegheny Pittsburgh*. 505 U.S. at 14-15. The Court explained that the declared policy *against* disparate taxation in *Allegheny Pittsburgh*—like the Indiana law here requiring equal taxation among property owners—rendered the proffered basis for distinguishing among taxpayers implausible. *Id.* at 15-16. The decision below, however, read *Nordlinger* to all-but-overrule *Allegheny Pittsburgh*, claiming that the latter "has essentially been narrowed to its facts." App. 28a. Indeed, the decision below reads much more like Justice Thomas's concurring opinion in *Nordlinger*, which asserted that *Allegheny Pittsburgh* simply "cannot be distinguished." 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment). But that was plainly not the view of the seven Justices in the *Nordlinger* majority. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

Even if the Indiana Supreme Court's reading of *Allegheny Pittsburgh* and *Nordlinger* were reasonable, surely it is not the only possible understanding. Indeed, as explained above, other courts do not share the majority's view of those cases, nor did the trial judge, court of appeals judges, and dissenting Indiana justices in this case. At a minimum, then, this Court's review is necessary to

clarify any uncertainty surrounding the proper interpretation of these decisions. This Court—not a divided panel of the Indiana Supreme Court—should have the last word on the vitality of decisions like *Allegheny Pittsburgh*.

C. The decision below also erred in dismissing the equal protection principles laid down in this Court's "so-called 'class-of-one' cases," App. 20a, because, the court observed, "this is not a class-of-one case," App. 23a. More particularly, the decision below was at pains to distinguish *Allegheny Pittsburgh* on the ground that it "has been characterized as a class-of-one case." App. 24a (citing *Engquist*, 553 U.S. at 602). Whether *Allegheny Pittsburgh* fits that description is entirely beside the point, because this Court has explained that a "class-of-one" theory is "not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle." *Engquist*, 553 U.S. at 592. The Court stated that point even more emphatically in *Olech*: "Whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis." 528 U.S. at 564 n.*. The decision below ignores that principle.

At other points, the decision below appears to suggest that this case would fail if it were framed under a class-of-one theory. The majority claimed that class-of-one claims require proof that the disparate treatment "was motivated by animus or ill-will toward the plaintiffs," relying on Justice Breyer's brief concurring opinion in *Olech* and a subsequent opinion by Judge Posner in *Bell* v. *Duperrault*, 367 F.3d 703, 709-13 (7th Cir. 2004). App. 22a-24a. Whether to impose such an onerous requirement for

class-of-one equal protection claims merits full consideration by this Court—particularly in light of this Court's pronouncements that proceeding under a class-of-one theory does *not* change the underlying equal-protection analysis.

III. The Question Presented Is Important

The question presented here is, of course, hugely important to the individual taxpayers involved: Northern Estates is a middle-class Indianapolis neighborhood, and the unfair imposition of more than $8,000 on each petitioner (or couple) imposes a severe burden on them. The question presented is also important to the hundreds of other Indianapolis taxpayers who have been similarly mistreated in connection with numerous other projects financed under the Barrett Law.[8] But the significance of this case reaches far beyond the city limits: The Indiana Supreme Court decision presents a serious threat to taxpayers nationwide and, perversely, will likely inhibit authorities' ability to collect revenue.

The decision below gives governments carte blanche to engage in arbitrarily discriminatory taxation. That is because the justifications deemed to satisfy rational-basis review would be available as a complete defense to virtually any disparate tax treatment. Government officials are perpetually facing "limited resources." If the decision below is left standing, governments will be allowed to justify the most harshly discriminatory action simply by asserting a purportedly "legitimate interest in not emptying [their] coffers." App. 19a. The administra-

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[8] Those taxpayers are members of the certified class in *Cox v. Indianapolis*. Damages for the class members have been assessed at $2,783,702. *Cox*, 2011 WL 2446702, at *1, 3.

tive-burden justification accepted below is likewise pernicious in its implications. As explained above, the "burden" imposed by refunding to petitioners an undisputed sum of money is trivial. If this passes muster, what wouldn't?

The evisceration of any meaningful constitutional scrutiny will make a real difference to millions of ordinary taxpayers. Particularly at the state and local level, tax policy is constantly shifting—assessment methods vary, rates fluctuate, and officials are constantly looking for ways to fund any number of projects. As a result, there are countless lines to be drawn and just as many opportunities to avoid making the often difficult choices that are the hallmark of rational taxation systems. Meaningful rational-basis scrutiny ensures that officials do not abdicate their responsibility and that they actually make a reasoned decision when they draw lines in the exercise of their taxing authority.

This case involves individual taxpayers, but both history and logic show that businesses will suffer too if the sweeping and misguided analysis of the Indiana Supreme Court is allowed to stand. Businesses provide inviting "deep pockets" for taxing authorities. The facts of the *Allegheny Pittsburgh* and *Armco Steel* cases, discussed above, show that it is far from hypothetical to think that taxing authorities will try to use wholly arbitrary distinctions to raise tax revenues from corporations. If the Indiana Supreme Court is right—if revenue enhancement and administrative convenience are enough to save an otherwise-unconstitutional taxing scheme under rational-basis scrutiny—then no business is safe from the arbitrary whim of taxing authorities. If "the power to tax involves the power to destroy," *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431

(1819) (Marshall, C.J.), then the Indiana Supreme Court has handed taxing authorities a lethal weapon. It is only a matter of time before that weapon is aimed discriminatorily at disfavored businesses.

Finally, the decision below is likely to have the perverse effect of *limiting* governments' options for collecting revenue. If a taxpayer has a choice between paying an assessment up front and paying over time, and the Constitution does not prohibit governments from retaining full payment in the event the assessment is forgiven or reduced, few would take the former option.[9] A government can require all taxpayers to pay up front, but the practical and political consequences of such a decision will be prohibitive with respect to larger assessments such as the one at issue here. That point is amply demonstrated by the fact that four times as many Northern Estates taxpayers chose an installment plan over payment in full. Conversely, a government could put all taxpayers on an installment plan, but doing so would necessarily delay the collection of proceeds and thus funding for the project. As a practical matter, localities need the ability in certain circumstances to encourage some taxpayers to pay now while allowing some to pay over time. But, if taxpayers inclined to pay in full have no assurance that shifting political winds will not leave them facing grossly disproportionate tax liability, they won't take that risk, eliminating that approach as a viable

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[9] If, as here, the installment option carries with it an interest charge, that rate is unlikely to be sufficiently high to encourage large numbers of taxpayers to pay up front. The whole point of an installment plan is presumably to ameliorate the economic effects of a tax assessment; that objective is undermined if the rate is significant.

option. The decision below thus has the perverse effect of curtailing taxing authorities' options at a time when they need maximum lawful flexibility.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 8, 2011

APPENDIX

APPENDIX A

In the Indiana Supreme Court

No. 49S02-1007-CV-402.

CITY OF INDIANAPOLIS, ET AL.,
Appellants (Defendants below),

v.

CHRISTINE ARMOUR, ET AL.,
Appellees (Plaintiffs below).

Appeal from the Marion Superior Court,
No. 49D11-0706-CT-026050.
The Honorable John F. Hanley, Judge.

On Petition to Transfer from the Indiana
Court of Appeals, No. 49A02-0901-CV-84.

May 10, 2011, Decided
May 10, 2011, Filed.

COUNSEL: ATTORNEYS FOR APPELLANTS: Jonathan L. Mayes, Chief Litigation Counsel; Justin F. Roebel, Assistant Corporation Counsel, Office of Corporation Counsel, Indianapolis, Indiana.

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ATTORNEYS FOR APPELLEES: Ronald J. Waicukauski, R. Davy Eaglesfield, III, Jana K. Strain, Indianapolis, Indiana.

JUDGES: Sullivan, Justice. Shepard, C.J., and David, J., concur. Rucker, J., dissents with separate opinion in which Dickson, J., concurs.

OPINION

Sullivan, Justice.

The City of Indianapolis abandoned the Barrett Law method of financing sewer improvements in favor of a new system that imposes less of a financial burden on property owners. To ease the transition, the City discharged all outstanding Barrett Law assessments owing as of November 1, 2005, but did not give refunds to those property owners who had previously paid their Barrett Law assessments in full or in part. We hold that the City did not violate the Equal Protection Clause of the Fourteenth Amendment because forgiving only the

outstanding assessment balances was rationally related to a legitimate governmental interest.

Background

Indiana's Barrett Law[1] authorizes municipalities to provide or require public improvements and fund those improvements by levying special assessments against the benefitted properties. Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1227 n.13 (Ind. 2000) (quoting Porter v. City of Tipton, 141 Ind. 347, 40 N.E. 802, 803 (1895)). The costs of Barrett Law projects are generally "apportioned equally among all abutting lands or lots" benefitted by the improvement. I.C. § 36-9-39-15(b)(3).

Prior to 2006, the City of Indianapolis ("City") used Barrett Law to fund sanitary sewer projects.

In April, 2001, the City sent a letter to property owners in the Northern Estates neighborhood notifying them that their properties were to be part of the Brisbane/Manning Barrett Law Sanitary Sewers Project ("Brisbane/Manning Project"), under which their properties were to be connected to City sewers, eliminating the use of septic tanks in the neighborhood. In July, 2004, after complying with then-existing regulatory procedures, the Indianapolis Board of Public Works ("Board") levied a $9,278 special assessment against each parcel subject to the project.[2]

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[1] Ind. Code §§ 36-9-39-1 to -30 (2007).

[2] One parcel had a preexisting sewer connection and was therefore assessed only $4,639.

Property owners were given the option of paying the special assessment up front in its entirety or paying it in monthly installments over a 10-, 20-, or 30-year period. Those choosing the installment plan were charged an annual interest rate of 3.5% and a statutory lien[3] was placed on their properties. Of the approximately 180 parcels covered by the project, property owners of 142 parcels elected to pay their special assessments in installments.[4] The owners of the remaining parcels chose to pay up front in a single lump-sum payment. The plaintiffs in this case are the owners of 31 of those parcels on which the assessment was paid up front.

The following year, the City-County Council of Indianapolis-Marion County ("Council") enacted a general ordinance under which the Barrett Law method of financing sewer projects was discontinued in favor of the Septic Tank Elimination Program ("STEP"). See Indianapolis-Marion County, Ind., City-County General Ordinance No. 107, 2005 (Oct. 31, 2005); see also Appellant's App. 320-35. The Council's action responded to two concerns. First, the City faced a public health crisis because of the continued use of out-of-date septic tanks on many properties. Second, the Barrett Law system was imposing too heavy a

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[3] Ind. Code § 6-1.1-22-13.5 (2010).

[4] Owners of 68 parcels chose the 30-year installment plan, with a monthly payment of $25.77; owners of 27 parcels chose the 20-year installment plan, with a monthly payment of $38.66; and owners of 47 parcels chose the 10-year installment plan, with a monthly payment of $77.27.

financial burden on middle- and low-income taxpayers, given that the average assessment under a Barrett Law project was approximately $10,000.[5]

At the time STEP was adopted, the Brisbane/Manning Project was one of more than 40 Barrett Law projects in existence. As with the Brisbane/Manning Project, some taxpayers subject to these other Barrett Law projects had elected to pay their assessments in full and some in installments. As part of the transition from Barrett Law to STEP, the Board passed Resolution 101, 2005 ("Resolution 101"), Appellant's App. 337, 350, forgiving all outstanding assessment balances on the 40-plus Barrett Law projects owing as of November 1, 2005.

As a result of Resolution 101, the owners of the 142 parcels in Northern Estates who had elected to pay their Barrett Law assessments over a period of years were discharged from their debts, along with all other taxpayers from other 40-plus Barrett Law projects who had outstanding balances due.

The plaintiffs in this lawsuit complain that Resolution 101 provided no relief for Northern Estates taxpayers who had paid their Barrett Law assessments in full for the Brisbane/Manning

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[5] Under STEP, sanitary sewer projects were to be paid for through an initial "hook-up fee" of $2,500 to connect a property to the City's sewers and through new bonds funded by increased sewer-usage rates. The lower connection fee and modest usage rates would permit more citizens' properties to be connected to the City's sewers, thereby alleviating the public health problem posed by septic tanks.

Project. But it was not just the Brisbane/Manning taxpayers who had paid their assessments in full who did not receive refunds; no taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid, including those who had paid some but not all of their installments — thousands of taxpayers, some of whom had paid all, some a lot, and some only a little of their respective assessments. Conversely, it was not only the Brisbane/Manning taxpayers who had elected the installment plan who had their outstanding balances forgiven; all taxpayers in all of the 40-plus Barrett Law projects had their outstanding balances forgiven, including those who had paid some but not all of their installments — thousands of taxpayers, some of whom owed all, some a lot, and some only a little of their respective assessments.

In February, 2006, the plaintiffs, who, to repeat, had each paid their Barrett Law assessments in full, petitioned the Board for a refund in an amount equal to the assessments discharged for those property owners who had paid the most under an installment plan.[6] In March, 2006, the Board sent a letter to the plaintiffs denying their refund request. Appellant's App. 317-18. It reasoned that there were many other Barrett Law projects subject to forgiveness and that issuing refunds to the plaintiffs "would establish a precedent of unfair and inequitable treatment to all other property owners

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[6] The plaintiffs who paid the full $9,278 assessment each sought refunds in excess of $8,000, and the plaintiff who was assessed half sought a refund in excess of $3,400.

who have also paid Barrett Law assessments." Id. at 318. And although November 1, 2005, "might seem arbitrary to [the plaintiffs], it [was] essential for the City to establish this date and move forward with the new funding approach." Id.

In July, 2007, the plaintiffs filed their complaint against the City and several of its officials[7] seeking, among other things, a Barrett Law assessment refund. In their federal claim under 42 U.S.C. § 1983 (2006), the plaintiffs alleged that the City had violated their federal constitutional rights to due process and equal protection under the Fourteenth Amendment.[8] In March, 2008, the plaintiffs moved for summary judgment on their federal constitutional claims. The City filed a cross-motion for summary judgment, arguing that the federal claims must fail because the City had a rational basis for refusing to grant the plaintiffs relief. The trial court denied the City's motion, granted the plaintiffs' motion, and entered judgment against the City for $380,914.16.[9]

On appeal, the plaintiffs abandoned their due process claim and sought to have the trial court's judgment sustained on equal protection grounds only. The Court of Appeals affirmed, finding that

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[7] We refer to the defendants collectively as the "City," unless otherwise specified.

[8] The plaintiffs also raised several claims under both the Indiana Constitution and various Indiana statutes, but none of those claims are issues in this appeal.

[9] The trial court failed to award prejudgment interest, and the City concedes that this was error.

the City did not have a rational basis for granting relief to those who were paying their Barrett Law assessments in installments and denying relief to those who had paid up front in a lump sum. City of Indianapolis v. Armour, 918 N.E.2d 401, 409-19 (Ind. Ct. App. 2009), reh'g denied. The Court of Appeals also held that the City could remedy the violation only by issuing refunds to the plaintiffs. Id. at 419.

The City sought, and we granted, transfer, City of Indianapolis v. Armour, 940 N.E.2d 821 (Ind. 2010) (table), thereby vacating the opinion of the Court of Appeals, Ind. Appellate Rule 58(A). Amici Curiae, the Indiana Association of Cities and Towns and the Indiana Municipal Lawyers Association, filed a brief in support of the City's Petition to Transfer.

Discussion

The only issue presented is whether the City's forgiveness of all outstanding Barrett Law assessments as part of its transition to STEP violated the plaintiffs' rights under the Equal Protection Clause, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A law attacked on equal protection grounds will be upheld if it survives rational basis review, unless the classification is drawn along suspect lines or infringes the exercise of fundamental constitutional rights, in which case it must survive heightened judicial scrutiny. FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113

S. Ct. 2096, 124 L. Ed. 2d 211 (1993); Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

Because Resolution 101 neither involves a suspect classification nor inhibits the exercise of a fundamental constitutional right, the parties agree that it is not subject to heightened judicial scrutiny and must be analyzed under the rational basis standard. But they offer differing interpretations and applications of that standard, which requires us to examine the intricacies of the standard itself.

I

Rational basis is the most deferential standard of review. Under this standard, courts will not invalidate a law merely because it is deemed unwise, unfair, or unsound, or because there are "more reasonable" or "more effective" policy choices that could have been made. Beach Communications, 508 U.S. at 313-14; Ind. Aeronautics Comm'n v. Ambassadair, Inc., 267 Ind. 137, 368 N.E.2d 1340, 1346 (1977). Rather, "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process." Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979) (footnote omitted).

Governmental decision makers are afforded the greatest leeway in making classifications and drawing lines with regard to taxation. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973) (quoting

Madden v. Kentucky, 309 U.S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590 (1940)); see also Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108, 123 S. Ct. 2156, 156 L. Ed. 2d 97 (2003) ("[T]he Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."). Thus, courts are "especially deferential in the context of classifications made by complex tax laws." Nordlinger, 505 U.S. at 11.

Under the rational basis standard, laws are clothed with a strong presumption of constitutionality. Beach Communications, 508 U.S. at 314 (citation omitted); see also Nordlinger, 505 U.S. at 10 ("'[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'" (alteration added) (quoting McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961))). The party challenging the law bears the burden of proving that there is no rational basis for the government's classification, Beach Communications, 508 U.S. at 315 (citations omitted), and this can be done "'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes,'" Lehnhausen, 410 U.S. at 364 (quoting Madden, 309 U.S. at 88).

On the other hand, a classification survives rational basis review if (1) "there is a plausible policy reason for the classification," (2) "the legislative facts on which the classification is

apparently based rationally may have been considered to be true by the governmental decision-maker." and (3) "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Nordlinger, 505 U.S. at 11 (citations omitted).

First, the government's classification must be based on policy reasons that are both legitimate and plausible. The legitimate governmental interests of states and municipalities are numerous, given their broad police powers. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 25, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (discussing breadth of states' police powers). In particular, states and local governments have a legitimate interest in their own efficient and effective operation. Cf. Garcetti v. Ceballos, 547 U.S. 410, 417-20, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (limiting public employees' first amendment rights because of governmental interest in operational effectiveness and efficiency). Thus, administrative convenience and minimizing administrative costs are legitimate governmental interests. See, e.g., Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 511, 57 S. Ct. 868, 81 L. Ed. 1245 (1937) ("Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others." (citations omitted)). Governments also have a legitimate interest in preserving their limited resources when granting benefits, and the U.S. Supreme Court has consistently upheld statutes and regulations that adjust the allocation of limited funds and resources,

most often in the welfare context. See, e.g., Bowen v. Gilliard, 483 U.S. 587, 599, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987) (upholding law that reduced welfare benefits for some); Lyng v. Castillo, 477 U.S. 635, 639-43, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986) (upholding law that reduced food stamp allotment for some); Jefferson v. Hackney, 406 U.S. 535, 549, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972) (upholding reduction of welfare benefits for some because "budgetary constraints [did] not allow the payment of the full standard of need for all welfare recipients"); cf. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176-79, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980) (upholding statute reducing retirement benefits for some railroad employees).

The legitimate interest justifying the classification need only be plausible. That is, it does not matter what the actual policy reason was, so long as a legitimate reason can be conceived. Beach Communications, 508 U.S. at 315 (citations omitted); Ind. Aeronautics Comm'n, 368 N.E.2d at 1344 (citation omitted). And it is no requirement that the conceivable policy in fact motivated the governmental decision maker. Beach Communications, 508 U.S. at 315 (citing *Fritz*, 449 U.S. at 179). Rather, a policy reason is sufficiently plausible if it "'may reasonably have been the purpose and policy' of the relevant government decisionmaker." Nordlinger, 505 U.S. at 15-16 (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528-29, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio Law Abs. 312 (1959)).

Second, the government's classification must be based on legislative facts which "rationally may have been considered to be true by the governmental decisionmaker." Id. at 11 (citation omitted). But the governmental decision makers are not required to prove any underlying facts on which the classification is based, Beach Communications, 508 U.S. at 315 (citing Vance v. Bradley, 440 U.S. at 111); the government need only have rationally believed to be true the facts prompting the classification, Nordlinger, 505 U.S. at 11 (citation omitted); Ind. Aeronautics Comm'n, 368 N.E.2d at 1344-46. In Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981), for example, the U.S. Supreme Court upheld a state statute banning the sale of milk in plastic containers but allowing the sale of milk in containers made of other materials, primarily paper. The fact that the ban might not actually have promoted environmentally desirable packaging did not have to be proven; "the Equal Protection Clause [was] satisfied by [the Court's] conclusion that the Minnesota Legislature could rationally have decided that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives." Id. at 466 (emphasis in original). And although the Minnesota Supreme Court may have been correct that the ban was "not a sensible means of conserving energy," it is for "'legislatures, not courts, to decide on the wisdom and utility of legislation.'" Id. at 469 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)).

Third, the government is not required to use narrowly tailored classifications to serve the law's purpose. The classification needs only rationally to further the law's purpose, Nordlinger, 505 U.S. at 10 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), and City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (per curiam)), and not be "so attenuated as to render the distinction arbitrary or irrational," id. at 11 (citing City of Cleburne, 473 U.S. at 446). The classification need not be drawn "'with mathematical nicety'" because the issues facing governments "'are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.'" Dandridge v. Williams, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970) (citations omitted). As the Supreme Court previously has explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection

> Clause goes no further than the invidious discrimination.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 563 (1955) (citations omitted).

II

Applying this standard, we find that Resolution 101 satisfies rational basis review and therefore does not run afoul of the Equal Protection Clause. Resolution 101 was part and parcel of the City-County Council's ordinance moving the City from Barrett Law to STEP.[10] Similar to the reasons prompting the overall transition to STEP, the text of Resolution 101 provides that it was enacted

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[10] On October 20, 2005, at a meeting of the Public Works Committee of the City-County Council, the director of the Department of Public Works informed the Committee of the plan to forgive all outstanding Barrett Law assessments, while not reimbursing property owners who had already paid their assessments. See Committee Meeting Minutes, Public Works Comm., City-County Council of Indianapolis-Marion County, Ind., at 6-10 (Oct. 20, 2005), available at http://www.indy.gov/eGov/Council/PDF/Committee/Minutes/PWKS102005min.pdf (last visited May 6, 2011). The Committee voted 8-0 to send Proposal No. 535, 2005, to the full City-County Council with a recommendation that it "Do Pass." Id. at 10. Although the minutes from this meeting are not included in the record, we take judicial notice of them because they constitute the "legislative history" of City-County General Ordinance No. 107, 2005, and are thus part of that codified municipal ordinance. Ind. Evidence Rule 201(b); cf. Peoples v. State, 929 N.E.2d 750, 754 & n.6 (Ind. 2010) (utilizing legislative history to explain a state criminal statute).

because Barrett Law funding imposed financial hardships on middle- and low-income property owners who were often most in need of sanitary sewers due to failing septic systems. Appellant's App. 337, 350. Providing relief or support for citizens facing financial hardship is clearly a legitimate interest. E.g., Fitzgerald, 539 U.S. at 108-09; Carmichael, 301 U.S. at 515 ("Support of the poor has long been recognized as a public purpose." (citing Kelly v. Pittsburgh, 104 U.S. 78, 81, 26 L. Ed. 658 (1881))).

Moreover, it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans. To be sure, there might be some property owners who could have paid up front but elected to pay in installments, despite being required to pay more because of interest. And it is possible that there are some who paid up front that are currently experiencing financial hardship. But, like in Clover Leaf Creamery, it does not matter under rational basis review what the actual facts would show, as determined in court, so long as the issue was at least debatable when the governmental decision maker acted. Thus, the Court of Appeals erred in requiring the City to come forth with proof that all the property owners who had their assessments discharged were actually middle- or low-income participants in the Brisbane/Manning Project. See Armour, 918 N.E.2d at 413 n.9. Finally, eliminating tax burdens is clearly a rational way of eliminating financial hardship caused by the tax burden.

There are several other interrelated plausible policy reasons for Resolution 101.[11] As noted under

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[11] Contrary to the plaintiffs' position and the opinion of the Court of Appeals, these policy reasons may be considered because they are consistent with and related to the purpose stated in the text of the Resolution. There are cases where a conceivable policy reason has been held to be not reasonably the purpose and policy of the governmental decision maker. But in those cases, the text of the law includes a purpose, or the government argues for a purpose, that renders the law unconstitutional. The government may not then save the law by arguing that such purpose was not actually the purpose of the law and rely on a different conceivable purpose that is contrary to or inconsistent with the stated purpose. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 529-30, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio Law Abs. 312 (1959) (distinguishing Wheeling Steel Corp. v. Glander, 337 U.S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544, 55 Ohio Law Abs. 305 (1949), in which the statute's stated purpose discriminated against nonresidents, but the state argued that the statute's purpose was to eliminate the discrimination against nonresidents); see also Nordlinger, 505 U.S. at 16 n.7 (discussing and applying the Allied Stores principle).

But this exception does not prevent the government from supplementing a textual purpose with consistent or related interests. Laws are often motivated by many purposes or objectives, which may balance with or against each other "but still serve[] the general objective when seen as a whole." Fitzgerald, 539 U.S. at 108 (citing Fritz, 449 U.S. at 181 (Stevens, J., concurring in judgment)); see also Ind. Aeronautics Comm'n, 368 N.E.2d at 1345 (discerning general legislative objective from several different and even contrary objectives). Governmental decision makers generally are not required to articulate their objectives, Beach Communications, 508 U.S. at 315 (citing Fritz, 449 U.S. at 179), and when they do so, it aids the general public in understanding the law, as well as courts and litigants. Moreover, such an all-or-none approach is foreign to rational basis review and its underlying principles. Cf. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949) ("It is no

Background, supra, the Brisbane/Manning Project was one of 40-plus Barrett Law projects subject to Resolution 101. The City could have reasonably believed that the benefits of simplifying sanitary sewer funding outweighed the effort of continuing a collection system for thousands of taxpayers, some of whom owed all, some a lot, and some only a little of their respective assessments. This is particularly so since keeping the outstanding payment obligations in play would have meant not only maintaining such a collection system but also sitting on the tax liens for up to 30 years. See Carmichael, 301 U.S. at 511; see also Beach Communications, 508 U.S. at 317-19 (justifying classification on administrative efficiency and conservation of limited regulatory resources); Lehnhausen, 410 U.S. at 365 (same). And the fact that it chose to draw the line at November 1, 2005, was a matter of discretion appropriately exercised by the City and the Board. See Fitzgerald, 539 U.S. at 108 ("'The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" (quoting Fritz, 449 U.S. at 179) (omissions in original)).

Furthermore, the decision not to issue refunds to those who had already paid implicates another legitimate interest — preservation of limited

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requirement of equal protection that all evils of the same genus be eradicated or none at all." (citation omitted)).

resources. The City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessments. The funds from the particular assessments at issue here were used to fund the Brisbane/Manning Project and had already been spent in constructing those sewers. The plaintiffs each paid for a sewer and received a sewer, along with all the attendant public health benefits associated with sanitary sewers. This was not a case in which the plaintiffs were assessed for a local benefit and did not receive that local benefit. Cf. Carmichael, 301 U.S. at 523 n.15 (providing that where a local special assessment is "apportioned to benefits it is not constitutionally defective because the assessment exceeds the benefits" (citation omitted)). It is true that those whose assessments were discharged also received a sewer and did so at a lower price. But the Equal Protection Clause does not require substantive equality among taxpayers if there is a rational basis for differing treatment, and the Court of Appeals erred in concluding otherwise.

The City's decision to forgive outstanding assessments was rationally related to its legitimate interests in reducing its administrative costs, providing relief for property owners experiencing financial hardship, establishing a clear transition from Barrett Law to STEP, and preserving its limited resources.

III

Despite the well-established rational basis standard described and applied in Parts I and II,

supra, the plaintiffs urge us to adopt a different standard of scrutiny. Although they label it "rational basis," it is a standard that is unknown in equal protection jurisprudence. They offer no evidence that the City's decision to enact Resolution 101 was irrational. Rather, they argue that the City bears the burden of establishing a rational basis in the first place, and, to meet its burden, the City is required to submit evidence that those whose debts were discharged were actually middle- or low-income property owners. Because the City failed to carry this burden, they argue that they are entitled to summary judgment.

A

The plaintiffs rely primarily on the so-called "class-of-one" cases, which differ from typical equal protection cases. In typical cases, parties challenge government action that categorizes citizens into particular groups and then treats those groups differently, alleging either "that they have been arbitrarily classified as members of an 'identifiable group,'" Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146, 2152, 170 L. Ed. 2d 975 (2008) (citation omitted), or that they are indeed members of an identifiable group against which the government has unconstitutionally discriminated, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 487-88, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (racially segregated schools). The laws underlying typical equal protection claims may be facially discriminatory, see, e.g., Vance v. Bradley, 440 U.S. at 95 (law requiring Foreign Service employees to retire at age 60 but imposing no mandatory retirement age for

Civil Service employees), or they may be facially neutral but applied in a way that disparately impacts an identifiable class,[12] see, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (invalidating a facially neutral ordinance because an administrative board had used its discretion under the ordinance to discriminate against individuals of Chinese ancestry).

In rare cases, a facially neutral law will be applied in a discriminatory manner against an individual or a small group of individuals whose only common characteristic is that they have been singled out for different treatment (in essence, an otherwise unidentifiable group). The absence of an identifiable class does not preclude a plaintiff from raising an equal protection claim because the Equal Protection Clause "'protect[s] persons, not groups.'" Engquist, 128 S. Ct. at 2150 (alteration in original) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (emphasis omitted)). Thus, a plaintiff who is not part of an identifiable class but is singled out for discriminatory treatment can raise a "class-of-one" equal protection claim. See Vill. of Willowbrook v.

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[12] Disparate impact is not sufficient, however, to trigger heightened scrutiny (if otherwise applicable). See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273-74, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (gender classifications); Washington v. Davis, 426 U.S. 229, 239-46, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976) (racial classifications).

Olech, 528 U.S. 562, 564-65, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam).[13]

In many class-of-one cases, underlying the government's decision is animus or ill-will toward the plaintiffs. E.g., Olech v. Vill. of Willowbrook, 160 F.3d 386, 387-88 (7th Cir. 1998) (Posner, C.J.), aff'd on other grounds, Olech, 528 U.S. at 565; see also Esmail v. Macrane, 53 F.3d 176, 178-79 (7th Cir. 1995) (Posner, C.J.). The Supreme Court in Olech did not reach the question of whether the Village's subjective motivations were sufficient to state a class-of-one claim. Olech, 528 U.S. at 565. In a concurring opinion, however, Justice Breyer reasoned that "the presence of [animus or vindictiveness] in this case [was] sufficient to minimize any concern about transforming run-of-the-ill zoning cases into cases of constitutional right." Olech, 528 U.S. at 566 (Breyer, J., concurring). Subsequently, Judge Posner wrote in

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[13] In Olech, the Village conditioned the connection of the plaintiffs' property to the municipal water supply on the plaintiffs' granting to the Village a 33-foot easement, even though the Village required only a 15-foot easement from other similarly situated property owners. Olech, 528 U.S. at 563. The Court held that the plaintiffs had raised a cognizable equal protection claim sufficient to withstand a motion to dismiss, acknowledging that class-of-one plaintiffs had raised successful equal protection claims where they "ha[d] been intentionally treated differently from others similarly situated" and "there [was] no rational basis for the difference in treatment." Id. at 564 (citing Sioux City Bridge Co. v. Dakota Cnty., 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923), and Allegheny Pittsburgh Coal Co. v. Webster Cnty. Comm'n, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989)).

Bell v. Duperrault, 367 F.3d 703, 709-13 (7th Cir. 2004) (Posner, J., concurring), what is to us a most convincing argument for adopting Justice Breyer's reasoning in Olech.

The plaintiffs argue that the relevant class is limited to the property owners in Northern Estates who were subject to the Brisbane/Manning Project Barrett Law assessment. In essence, they argue this is a class-of-one case because they were treated differently than the other residents of Northern Estates.

We disagree and hold that this is not a class-of-one case. The text of Resolution 101 defines the group entitled to receive the benefit, to the exclusion of all others. It distinguishes between property owners who had outstanding Barrett Law assessments on November 1, 2005, and property owners who did not. Only those who had outstanding assessments on that date were subject to the benefit of Resolution 101. Resolution 101 does not limit the Barrett Law projects to which it applies but forgives all outstanding Barrett Law assessments, regardless of the particular project under which the assessments were levied. As discussed supra, it was not just Brisbane/Manning taxpayers who had paid their assessments in full who did not receive refunds; no taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid, including those who had paid some but not all of their installments — thousands of tax-payers, some of whom had paid all, some a lot, and some only a little of their respective assessments.

Unlike the class-of-one cases, the Resolution makes a broad classification on the basis of a common characteristic — outstanding Barrett Law balances. Cf. Ind. Aeronautics Comm'n, 368 N.E.2d at 1347 (rejecting contention that the case was essentially a class-of-one claim because the grievance on which the claim was based was common to the whole class). And there is no evidence that the City's action was motivated by animus or ill-will toward the plaintiffs or any other property owners who did not have outstanding assessments.

B

In accepting the plaintiffs' standard, the Court of Appeals relied primarily on Allegheny Pittsburgh Coal Co. v. Webster County Commission, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989),[14] which, along with Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923), has been characterized as a class-of-one case. See Engquist, 128 S. Ct. at 2153-54; see also Olech, 528 U.S. at 564 (relying on those cases in holding that class-of-one claims are cognizable). The Court of Appeals explicitly disregarded Nordlinger and Fitzgerald, the two most recent equal protection challenges to tax classifications, because although they "are instructive on the general principles of

[14] Although this seems to be the principal case relied upon by the Court of Appeals, the plaintiffs did not rely on it in their original brief, citing it only once as part of a block quotation to a different case. Appellee's Br. 12-13 (quoting Engquist, 128 S. Ct. at 2153-54).

equal protection," they "differ on their facts from this case to such an extent that they are not helpful in resolving the question in this appeal." Armour, 918 N.E.2d at 411 n.8. We disagree with this analytical approach.

In Allegheny Pittsburgh, a West Virginia county tax assessor valued the plaintiffs' property on the basis of its recent purchase price and made only minor adjustments in the assessments of properties that had not been sold, resulting in gross disparities in tax treatment over a span of approximately ten years.[15] 488 U.S. at 338, 341-42. The Court held that the county tax assessor had violated the plaintiffs' rights to equal protection. Id. at 338. The county argued that its scheme was rationally related to the purpose of assessing properties at true current market value. Id. at 343. The Court held that the means were not rationally related to achieving equal assessments based on true market value because the general adjustments were not large enough to approximate the true market value of properties that had not been recently sold. Id. at 343-46.

In Nordlinger, decided three terms later, the Court held that California's Proposition 13 did not violate the Equal Protection Clause. 505 U.S. at 18. Under Proposition 13, recently sold property was assessed based on its acquisition value or the

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[15] The adjustments made to properties that had not been recently sold were small, and it would have taken an estimated 500 years for the assessments of those properties to equalize with the assessments on the plaintiffs' properties. Allegheny Pittsburgh, 488 U.S. at 341-42.

amount paid to acquire the property, but property that had not been recently acquired was assessed based on its appraised value in 1975-1976, with minor annual inflation adjustments. Id. at 5. The plaintiff estimated that she would end up paying almost $19,000 in property taxes over ten years, while her similarly situated neighbors who had not recently acquired their properties would pay only $4,100. Id. at 7.

The Court held that the classification between newer owners and older owners did not violate the Equal Protection Clause because it was rationally related to legitimate governmental interests. Nordlinger, 505 U.S. at 12-17. There were at least two rational considerations for the classification. First, the State had a legitimate interest in neighborhood preservation, which was served by permitting those residents who had owned their homes longer to pay lower property taxes. Id. at 12. Second, the State could legitimately protect long-term owners' reliance interest against having to pay higher taxes, reasoning that a new owner has all the information about the tax burden before buying and could decide not to buy, whereas an older owner may be forced to sell the home because he or she cannot satisfy the higher tax burden; that is, "the State may decide that it is worse to have owned and lost, than never to have owned at all." Id. at 12-13.

The effects of the tax schemes in Allegheny Pittsburgh and Nordlinger were the same.[16]

[16] In fact, in Allegheny Pittsburgh, the Court expressly stated that it was not deciding the validity of California's Proposition 13. Allegheny Pittsburgh, 488 U.S. at 344 n.4.

Property that was recently sold was assessed at its acquisition value, while minor adjustments were made to the assessments of properties not recently sold. And the differing methods of assessment resulted in gross disparities in the tax burden of similarly situated property owners.

But the outcome of Nordlinger differed from the outcome in Allegheny Pittsburgh. The most critical difference was the legitimate government purpose and the relationship of the tax scheme to that purpose.[17] "Allegheny Pittsburgh was the rare case

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[17] Another difference between the two cases was that the constitutional provision challenged in Nordlinger was a generally applicable state law, whereas the scheme in Allegheny Pittsburgh was an "aberrational enforcement policy," Allegheny Pittsburgh, 488 U.S. at 344 n.4, used by the county assessor, "apparently on her own initiative" and contrary to the state's constitutional, statutory, and regulatory policies, id. at 345. In Nordlinger, however, the Court addressed this difference in a footnote:

> In finding Allegheny Pittsburgh distinguishable, we do not suggest that the protections of the Equal Protection Clause are any less when the classification is drawn by legislative mandate, as in this case, than by administrative action, as in Allegheny Pittsburgh. Nor do we suggest that the Equal Protection Clause constrains administrators, as in Allegheny Pittsburgh, from violating state law requiring uniformity of taxation of property.

Nordlinger, 505 U.S. at 16 n.8 (citations omitted).

Thus, the fact that the body that enacted Resolution 101 was a City administrative body, rather than the state or city legislature, is irrelevant. Moreover, this administrative action was a quasi-legislative rulemaking action, rather than a quasi-adjudicatory enforcement action.

where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme. By contrast, [the California Constitutional provision] was enacted precisely to achieve the benefits of an acquisition-value system." Nordlinger, 505 U.S. at 16 (emphasis added). We read the Court's contrasting of the cases in this way to mean that it considered Allegheny Pittsburgh to have been a class-of-one case — a tax policy directed at a particular taxpayer. Cf. Bell, 367 F.3d at 712 (Posner, J., concurring) (reasoning that "requiring proof of bad motive brings the class-of-one cases into harmony with . . . the purpose behind the equal protection clause," which "is to protect the vulnerable," even if the "vulnerable" is "a coal company that because its major assets (its mines) cannot be shifted to another state finds itself targeted for discriminatory taxation, as in Allegheny Pittsburgh"). It has in fact been characterized as a class-of-one case, *see* Engquist, 128 S. Ct. at 2153-54; Olech, 528 U.S. at 564; Bell, 367 F.3d at 712, which, again, the case before us is not, see Part III-A, supra. And at a minimum, Allegheny Pittsburgh has essentially been narrowed to its facts and stands as a "rare case" where the means did not rationally further the government's legitimate purpose. Nordlinger, 505 U.S. at 16. Additionally, it has been criticized by at least one Justice on the Supreme Court and by scholars.[18]

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[18] See Nordlinger, 505 U.S. at 18-28 (Thomas, J., concurring in part and concurring in the judgment) (providing a critical analysis of Allegheny Pittsburgh and suggesting it was wrong). As to criticism by scholars, see, for example, William Cohen, State Law in Equality Clothing: A Comment on

For these reasons, Allegheny Pittsburgh is inapposite, and the Court of Appeals erred in relying on that case to the exclusion of Nordlinger and other cases applying traditional rational-basis analysis.

C

The plaintiffs also cite a number of decisions from other jurisdictions in which courts have invalidated various debt-forgiveness measures as a violation of equal protection. In effect, they argue that granting a benefit to those who do not pay their taxes promptly but not to those who do pay their taxes promptly is per se arbitrary and capricious. The Court of Appeals also found persuasive the reasoning of these decisions. See Armour, 918 N.E.2d at 412.

The primary case relied upon by the plaintiffs, and considered persuasive by the Court of Appeals, is Armco Steel Corp. v. Michigan Department of Treasury, 419 Mich. 582, 358 N.W.2d 839 (Mich.

Allegheny Pittsburgh Coal Company v. County Commission, 38 UCLA L. Rev. 87, 104 (1990) ("In time, Allegheny should suffer the same fate as Morey v. Doud — overruled as a 'decision [that] so far departs from proper equal protection analysis in cases of' taxation." (alteration in original) (citing City of New Orleans v. Dukes, 427 U.S. 297, 306, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (per curiam), overruling Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957))); Robert Jerome Glennon, Taxation and Equal Protection, 58 Geo. Wash. L. Rev. 261, 263 (1990) (arguing that "Allegheny's analytical approach should be discarded quickly").

1984). In that case, corporations had two procedural remedies available to challenge their assessed franchise fees: (1) petition for a redetermination and withhold payment, or (2) pay the fee and file a written petition within three years. Id. at 844. The plaintiffs chose the second route, electing to pay the fee and then challenge it. Id. at 841. The Michigan Supreme Court had previously held that the treasury department had not had the authority to calculate the franchise fee based on its audits of the corporations. Id. at 840-41. In response to that holding, the treasury department cancelled or rescinded deficiencies that remained unpaid, but it refused to grant refunds to corporate taxpayers who had already paid the franchise fees. Id. at 841.

The Michigan Supreme Court held this practice to violate the Equal Protection Clause. Id. at 844. We find Armco Steel incorrect in its articulation of equal protection law and distinguishable on its facts.[19]

As to equal protection law, the Michigan Supreme Court did not consider whether there was a legitimate purpose and whether the means used were rationally related to furthering such a purpose. See id. at 843-44 (relying on Sioux City Bridge Co., 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, a class-of-one case, and principles of substantive equality). As to the facts, there was in Armco Steel a sense of foul play present in that the

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[19] Prior to the opinion of the Court of Appeals in this case, Armco Steel had not been cited by any courts outside of Michigan.

initial assessment of the franchise fees had been held to be illegal, and although the treasury department gave relief to some who were assessed illegally, it did not grant relief to others who were also assessed illegally. In this case, however, the plaintiffs do not challenge the validity of the original Barrett Law assessment, and there is no other evidence of animus, ill-will, foul play, or other improper motive.

We also find unpersuasive the cases from other jurisdictions cited by the plaintiffs and the Court of Appeals, which include Richey v. Wells, 123 Fla. 284, 166 So. 817 (Fla. 1936); State ex rel. Stephan v. Parrish, 257 Kan. 294, 891 P.2d 445 (Kan. 1995); State ex rel. Matterson v. Luecke, 194 Minn. 246, 260 N.W. 206 (Minn. 1935); State ex rel. Hostetter v. Hunt, 132 Ohio St. 568, 9 N.E.2d 676 (Ohio 1937); and Snow's Mobile Homes, Inc. v. Morgan, 80 Wn.2d 283, 494 P.2d 216 (Wash. 1972) (en banc).[20] All but one of these cases considered challenges under state constitutions, rather than

[20] Many of these cases were also cited in Armco Steel, 358 N.W.2d at 844 n.6.

challenges under the Equal Protection Clause of the Fourteenth Amendment.[21] The only case to consider a federal claim was Richey, where the court concluded that "the constitutional requirement of equal protection of the tax laws prohibits the Legislature from selecting and classifying delinquent taxpayers as the beneficiaries of special tax concessions . . . unless the same benefits are made equivalently available in some form or other to nondelinquent taxpayers." 166 So. at 819. The court's opinion, however, cited no authority for this proposition, stating only that it was the "view" of the majority opinion's author. Id.

In each of these cases, delinquent taxpayers had been granted relief from their tax obligations, but those who had paid their taxes on time received no relief. See Richey, 166 So. at 819-20 (Terrell, J., dissenting); Parrish, 891 P.2d at 454; Luecke, 260 N.W. at 208; Hunt, 9 N.E.2d at 677, 681-82; Snow's Mobile Homes, 494 P.2d at 219. Of course, the policy before us is not directed at delinquent taxpayers. Underlying several of the decisions was that the policies were arbitrary because they rewarded those who failed to pay their taxes and punished those who paid their taxes on time, thereby encouraging delinquency. See Luecke, 260 N.W. at 208 ("[T]he statute here concerned encourages and fosters tax delinquencies in the state. . . . Such result is not

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[21] Although the Kansas Supreme Court stated that the challenged provisions of the Kansas Constitution were "substantially identical" to the Equal Protection Clause (as opposed to completely identical), Parrish, 891 P.2d at 457 (citation omitted), it did not cite any federal law in its analysis.

desirable, and demonstrates the unreasonableness of the classification."); see also Hunt, 9 N.E.2d at 683 (quoting Luecke); Parrish, 891 P.2d at 455-57 (relying on Hunt). With this rationale we cannot disagree; it certainly seems that such a regime would be bad policy. But that is exactly what it is — a policy choice. And "equal protection is not a license for courts to judge the wisdom, fairness, or logic of [policy] choices." Beach Communications, 508 U.S. at 313. Thus, we do not find these decisions from other jurisdictions persuasive and decline to follow them.

IV

Applying the appropriate standard of review under the Equal Protection Clause to the undisputed facts, we hold that Resolution 101 does not violate the Equal Protection Clause as applied in this case because it is rationally related to legitimate governmental interests. And because we find that the City did not violate the plaintiffs' rights under the Equal Protection Clause, we have no occasion to consider whether the trial court was correct in requiring the City to provide refunds to

the plaintiffs or whether alternative remedies consistent with due process were available.[22]

Conclusion

We hold that Resolution 101 does not violate the Equal Protection Clause of the Fourteenth Amendment because it is rationally related to legitimate governmental interests. Accordingly, we reverse the decision of the trial court and remand with instructions to grant judgment for the City on the plaintiffs' federal equal protection claim.

Shepard, C.J., and David, J., concur.

Rucker, J., dissents with separate opinion in which Dickson, J., concurs.

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[22] We acknowledge that a similar claim attacking the validity of Resolution 101 was brought by a different group of plaintiffs in the United States District Court for the Southern District of Indiana and that the court there decided in the plaintiffs' favor. Cox v. City of Indianapolis, No. 1:09-cv-435-WTL-DML, 2010 U.S. Dist. LEXIS 58876, 2010 WL 2484620 (S.D. Ind. June 14, 2010); see also Cox v. City of Indianapolis, No. 1:09-cv-435-TWP-MJD, 2011 U.S. Dist. LEXIS 2890, 2011 WL 96669 (S.D. Ind. Jan. 11, 2011) (denying the City's motion to alter or amend judgment). We do not find Cox persuasive because it relied almost entirely on the now-vacated opinion of our Court of Appeals in this case, quoting from it extensively. And, as we have concluded here, it is our opinion that the Court of Appeals did not apply the appropriate equal protection standard.

Rucker, Justice, dissenting.

I am not persuaded that the City has advanced a rational basis for its classification between property owners who chose to pay their Barrett Law assessments in a lump sum and those who elected to pay in installments. Instead, I am of the view that Resolution 101 violates the Equal Protection Clause of the United States Constitution as applied to the homeowners in this case. Therefore I respectfully dissent.

The government has broad discretion to draw lines classifying persons for purposes of disparate treatment. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315-16, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). "But there is a point beyond which the State cannot go without violating the Equal Protection Clause." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio Law Abs. 312 (1959). Specifically, a government classification may not be capricious or arbitrary and "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Id. at 527 (internal quotation marks and citations omitted).

Supreme Court jurisprudence teaches that a legislative body is not required to articulate its reasons for enacting a statute. Beach Commc'ns, 508 U.S. at 315; Nordlinger v. Hahn, 505 U.S. 1, 15, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). But, when a legislature does state a reason for a statutory classification, the stated reason must be rationally related to the classification made. In such

circumstances, it is inappropriate to consider other conceivable or even expressed rationales for the purpose of "saving" an inadequately justified classification. See Allied Stores, 358 U.S. at 530 (recognizing that where statutes "specifically declared their purpose" they "left no room to conceive of any other purpose for their existence"); cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." (internal quotation marks and citation omitted)).

As the majority points out, Resolution 101 itself included the City's rationale for treating the Homeowners differently from other similarly situated property owners in Northern Estates, namely "because Barrett Law funding imposed financial hardships on middle- and low-income property owners who were often most in need of sanitary sewers due to failing septic systems." Slip op. at 9. More specifically the Resolution provided:

> Whereas, The Board of Public Works (Board) is authorized by Indiana Code (IC) 36-9-39 to administer 'Barrett Law Funding for Municipal Sewer' program under which the Board approves all Barrett Law projects within the City of Indianapolis-Marion County, including

[an] individual assessment amount per parcel, and

Whereas, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems, and

Whereas, The Department of Public Works (DPW) has a proposed rate and fee increase package to the City-County Council for approval to continue to address the re-capitalization, expansion, operation and maintenance, and regulatory requirements of the City's sanitary sewer system which was approved by the City-County Council on October 31, 2005 (Proposal No. 535 as amended) effective on January 1, 2006, and

Whereas, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis-Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

> Now, Therefore, Be It Resolved that [the Board] hereby forgive[s] all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005[,] forward to the Department of Public Works via the Barrett Law Assessment Bureau.

Appellant's App. at 350. For the most part this resolution expresses the City's reasons for discontinuing the Barrett Law method of financing sewer projects in favor of the Septic Tank Elimination Program. However, merely declaring that Barrett Law funding "imposed financial hardships on middle- and low-income property owners who were often most in need of sanitary sewers due to failing septic systems," does nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments.

To be sure the City advanced multiple post-hoc rationalizations for the differential treatment.[1] But

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[1] The Public Works Committee meeting minutes the majority cites at footnote 10 do appear to contain the reasoning of the director of the Department of Public Works for not reimbursing the homeowners, essentially because providing refunds would "simply be impossible." *Supra* Committee Meeting Minutes at 10, as cited in Slip op. at 9 n.10. This statement was made before the adoption of the Resolution, but I am not convinced this reasoning may be read in conjunction with the Resolution's stated purpose. Even if it could be considered, it only addresses why the Homeowners were not reimbursed, not why the Resolution made the chosen classification. Further, it is merely the reasoning of the

such arguments do not obviate the failure of the Resolution to pass rational basis scrutiny on the reasoning set forth in its text.

This is not a case like Clover Leaf, where the classification between plastic and non-plastic milk cartons satisfied equal protection concerns and there was evidence the legislature rationally believed the classification would further the stated objective of reducing solid waste, despite empirical evidence to the contrary. See Clover Leaf, 449 U.S. at 463-64, 469. Here, there is no indication that the Board even believed the classification would further its stated objective. The stated purpose in Resolution 101 simply fails to express any connection to the distinction between residents who elected to pay their assessments in a lump sum and those who elected to pay in installments. In my view this disconnect demonstrates that the classification fails to have "a fair and substantial relation" to the statutory objective. See Allied Stores, 358 U.S. at 527. I therefore agree with the Court of Appeals and would affirm the trial court's grant of summary judgment in favor of the homeowners.

Dickson, J., concurs.

Director of the Department of Public Works given in response to a citizen's question. There is no indication that such reasoning was adopted by the Board in Resolution 101. In addition the fact that most of these rationales were advanced during the course of this litigation, and nearly two and a half years after the Resolution was passed, renders them suspect in my view.

APPENDIX B

Supreme Court of Indiana

CITY OF INDIANAPOLIS
v.
CHRISTINE ARMOUR

July 30, 2010

918 N.E. 2d 401
Transfer granted.

APPENDIX C

In The Court of Appeals of Indiana

No. 49A02-0901-CV-84.

CITY OF INDIANAPOLIS, ET AL.,
Appellants-Defendants,

vs.

CHRISTINE ARMOUR, et al.,
Appellees-Plaintiffs.

APPEAL FROM THE
MARION SUPERIOR COURT

The Honorable John F. Hanley, Judge
Cause No. 49D11-0706-CT-26050

December 18, 2009

OPINION - FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE[1]

In this appeal, we are asked to determine whether a resolution ("the Resolution") passed by the Indianapolis Board of Public Works ("the Board") violates the Equal Protection Clause of the United States Constitution, as applied to forty-five property owners in Northern Estates, an Indianapolis neighborhood ("the Homeowners"). The Resolution was designed to move the City of Indianapolis (the "City") from the Barrett Law method of financing sewer projects to a different method under the Septic Tank Elimination Program ("STEP"). The Resolution forgave all Barrett Law assessments due and owing as of November 1, 2005. The Homeowners had already paid their assessments in full prior to that date, and they sought a refund equivalent to the amount the Resolution had forgiven their neighbors, who were making installment payments. The City and the Board refused, and the Homeowners filed a complaint seeking a refund, declaratory relief, or a writ of mandamus.

The City, the Board, and other defendants (hereinafter collectively referred to as "the City," unless otherwise specified) appeal from the trial court's summary judgment for the Homeowners. The City presents two issues for our review, which we restate as the following dispositive issue: whether the Resolution, which forgave all Barrett Law assessments due and owing as of November 1, 2005, as applied to the Homeowners violated the

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[1] We held oral argument in this case on August 19, 2009.

Homeowners' right to equal protection of the laws and entitled them to a partial refund of their assessments. We hold that the City's refusal to issue a refund to the Homeowners in an amount that would place them in rough equality with their similarly situated, and identically taxed, neighbors violated the Homeowners' right to equal protection of the laws.

We affirm and remand with instructions.[2]

FACTS AND PROCEDURAL HISTORY

The Homeowners own residential real estate in the Northern Estates neighborhood. In April of 2001, the City notified the Homeowners and other property owners in the neighborhood by letter that each of their properties would be part of a sanitary sewer project ("the project") to be funded under the Barrett Law, Indiana Code Chapter 36-9-39. "The 'Barrett Law' . . . provides the statutory process by which a municipality may provide or require public improvements." Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1227 n.13 (Ind. 2000). As applied here, the Barrett Law required the costs of

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[2] The Homeowners allege on cross-appeal that the trial court erred when it did not award them prejudgment interest. The City concedes that if the Homeowners are entitled to summary judgment on their federal constitutional claim, then prejudgment interest should have been added to that judgment. See Reply at 25. Because we affirm the trial court's grant of summary judgment for the Homeowners, we likewise remand with instructions for the trial court to determine the award of prejudgment interest for the Homeowners.

the project to be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15(b)(3).

In May of 2001, the City held a public meeting to explain the Barrett Law process, costs, proposed funding, and the design for the project. The City held another public meeting in June of 2002, and, in 2003, the Homeowners were given two opportunities to meet with members of the inspection and construction firms to discuss the project. In June of 2004, the City held a final public hearing on the project.

In July of 2004, the City assessed each property owner in Northern Estates $9,278[3] per parcel for the project. The City gave each owner the option to pay the assessment either in a lump sum or in installments over a term of ten, twenty, or thirty years. Each of the Homeowners paid the assessment in a single, lump sum payment. The other Northern Estates property owners chose an installment payment option.

The next year, on October 31, 2005, the City of Indianapolis and Marion County City-County Council ("the City-County Council") passed Ordinance No. 107, 2005, Proposal 535 ("the Ordinance"). Under the Ordinance, which had an effective date of January 1, 2006, the City abandoned its use of the Barrett Law as a means of funding new sewer improvements and created a different financing method under STEP. According

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[3] One of the Homeowners was assessed only $4,639 because her parcel had had a previous sewer connection.

to an affidavit executed more than two years later from James A. Garrard, the Chairperson of the Board ("the Garrard Affidavit"), "[t]he STEP program [sic] simplified utility planning, financing and operations by assessing a flat rate per sewer connection, whereas the Barrett Law program required assessment of fees based on each individual's use." Appellants' App. at 352. Under STEP, property owners adjacent to new sewer construction projects would be charged a flat $2,500 sewer-connection fee along with a monthly sewer bill. That connection fee would be paid in a single, lump sum payment by all affected property owners, although in "special cases" a property owner might qualify for a five-year installment plan. Id. at 4.

Following adoption of the Ordinance, on December 7, 2005, the Board passed the Resolution, which was titled, "A Resolution Forgiving Barrett Law Assessments." Id. at 350 (emphases removed). The Resolution stated:

> WHEREAS, The Board of Public Works (Board) is authorized by Indiana Code (IC) 36-9-39 to administer 'Barrett Law Funding for Municipal Sewer' program under which the Board approves all Barrett Law projects within the City of Indianapolis-Marion County, including [an] individual assessment amount per parcel, and
>
> WHEREAS, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to

lower income participants who most need sanitary sewer service in lieu of failing septic systems, and

WHEREAS, The Department of Public Works (DPW) has a proposed rate and fee increase package to the City-County Council for approval to continue to address the re-capitalization, expansion, operation and maintenance, and regulatory requirements of the City's sanitary sewer system which was approved by the City-County Council on October 31, 2005 (Proposal No. 535 as amended) effective on January 1, 2006, and

WHEREAS, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis-Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

NOW, THEREFORE, BE IT RESOLVED that [the Board] hereby forgive[s] all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005[,]

> forward to the Department of Public Works via the Barrett Law Assessment Bureau.

Id. (emphases added). On May 29, 2008, the City designated the Garrard Affidavit with its cross-motion for summary judgment. In the Affidavit, Garrard offered four reasons for passing the Resolution:

> a. The Board determined that the continued use of the Barrett Law funding system may present financial hardships on many middle[-] to lower-income participants who most needed sanitary sewer service in lieu of failing septic systems;
>
> b. The Board enacted [STEP] based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection;
>
> c. The City would no longer use [the] Barrett Law statute . . . for funding of the installation project, consequently the provisions of that statute were inapplicable, and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

> d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program [sic] would not benefit the taxpayers and [would] defeat the purpose of the flat[ ]rate per connection—namely, simplifying things.

Id. at 353.

The Homeowners had each paid their Barrett Law assessments in full before November 1, 2005. In its operation and effect, the Resolution released 142 other Northern Estates owners who had elected to pay in installments from making any more payments as of that date. Sixty-eight of those owners had paid $309.27 toward satisfaction of the assessment; twenty-seven had paid $463.90; and forty-seven had paid $927.80.

On February 4, 2006, the Homeowners asked the Board to issue a refund of their lump sum payments in an amount equivalent to the assessments forgiven for those property owners who had paid the most under an installment plan. On March 8, 2006, Garrard sent the Homeowners a letter denying their request for refunds. The letter stated, in part, that:

> The particular project area in which you reside is one of over 40 Barrett Law projects the City has constructed in the past. The circumstances of this project being constructed closer to the date in

> which the City chose to eliminate using Barrett Law . . . as a method of providing sewers to unsewered areas is one of prioritization. We recognize that the time frame would suggest to you that refunds are warranted, but the fact that this was a recent use of Barrett Law does not distinguish it from previous projects constructed using the same funding mechanism. Refunding payments made in your project area, or any portion of the payments, would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments. [The Board] made a decision to forgive Barrett Law assessments made after November 1, 2005[,] . . . and while this date might seem arbitrary to you, it is essential for the City to establish this date and move forward with the new funding approach.

Id. at 318 (emphasis added). Thereafter, on April 27, 2007, the Homeowners each filed a claim with the Marion County Auditor for a refund of an erroneous or excessive tax payment, pursuant to Indiana Code Chapter 6-1.1-26.

On July 22, 2007, the Homeowners filed their complaint against the City seeking a Barrett Law assessment refund, declaratory relief, or, in the alternative, a writ of mandamus. Specifically, the Homeowners alleged that the City's decision not to issue a refund violated the Equal Protection Clause and the Due Process Clause of the United States

Constitution[4]; Article 1, Section 23 and Article 10, Section 1 of the Indiana Constitution; and various Indiana statutes pertaining to relief for overpayment of Barrett Law assessments. The Homeowners also requested declaratory relief on the questions of their "right to a refund of their excess Barrett Law Assessment Payment" and whether they had properly exhausted administrative remedies against the City in seeking that refund. Id. at 9-10. Finally, in the event the trial court concluded that the Homeowners had not exhausted their administrative remedies, the Homeowners requested the court to issue a writ of mandamus to the Marion County Auditor, "who has refused to consider, approve or deny Plaintiffs'. . . applications for a refund." Id. at 11.

On March 11, 2008, the Homeowners moved for summary judgment, but only on their federal constitutional claims.[5] The Homeowners did not make any arguments under the Indiana Constitution or statutes in their motion. The City filed a cross-motion seeking a summary judgment of its own. In its motion, the City alleged that the Homeowners' federal constitutional claims must fail

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[4] The Homeowners asserted their federal constitutional challenges under 42 U.S.C. § 1983. The City does not dispute that that section of the United States Code was the proper procedural vehicle for the Homeowners to raise their constitutional claims against the City.

[5] Although the Homeowners' motion sought summary judgment on both equal protection and due process grounds, on appeal the Homeowners abandon their due process claims and seek to have the summary judgment order affirmed only under the Equal Protection Clause.

because the City had a rational basis for its refusal to issue refunds to the Homeowners. The City also argued that the Homeowners' state constitutional claims failed as a matter of law, and that the trial court lacked subject matter jurisdiction, both because the Homeowners had not properly exhausted their administrative remedies and had not timely filed their complaint. Following a hearing on both motions, the trial court granted the Homeowners' summary judgment motion, denied the City's motion, and entered judgment against the City in the amount of $380,914.16, including attorney's fees. This appeal ensued.[6]

DISCUSSION AND DECISION

Standard of Review

The City appeals from the trial court's order on summary judgment, which granted the Homeowners' request for summary judgment on their federal constitutional claims and denied the City's motion for summary judgment. Our standard of review for summary judgment appeals is well established. Knoebel v. Clark County Superior Court, 901 N.E.2d 529, 531 (Ind. Ct. App. 2009). An

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[6] The trial court did not indicate that its summary judgment order was a final judgment, and, on appeal, the City states that it is appealing as a matter of right from an interlocutory order for the payment of money. See Ind. Appellate Rule 14(A)(1). But the court's decision on the Homeowners' federal constitutional claims rendered their requests for identical relief under the Indiana Constitution and the Indiana Code, as well as their requests for declaratory relief and a writ of mandamus, moot. Thus, the parties are appealing from a final judgment.

appellate court faces the same issues that were before the trial court and follows the same process. Id. All doubts as to the existence of issues of material fact must be resolved against the moving party. Id. at 532. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. at 531-32. Where the facts are undisputed and the issue presented is a pure question of law, we review the matter de novo. Crum v. City of Terre Haute ex rel. Dep't of Redev., 812 N.E.2d 164, 166 (Ind. Ct. App. 2004). Here, the parties agree that the material facts are undisputed.

Also well settled is our standard of review when legislation or a regulation is alleged to be unconstitutional:

> Every statute stands before us clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing. The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion.

Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009) (citations and quotations omitted). In construing a city ordinance or resolution, this court uses the same methods of interpretation it applies to statutes. See Frampton v. Hutcherson, 784 N.E.2d 993, 996 (Ind. Ct. App. 2003), trans. denied.

The issue in this appeal is whether the City's refusal to issue a refund to the Homeowners violated their right to equal protection of the laws. The Homeowners have not challenged (1) the amount of the July 2004 assessment of their properties; (2) the constitutionality of the Ordinance; or (3) the facial validity of the Resolution's forgiveness provision. Rather, the Homeowners challenge the constitutionality of the forgiveness provision as applied to them. Unlike a facial challenge, an as-applied challenge "ask[s] only that the reviewing court declare the challenged statute or regulation unconstitutional on the facts of the particular case." Dowdell v. City of Jeffersonville, 907 N.E.2d 559, 564 (Ind. Ct. App. 2009) (quoting Sanjour v. E.P.A., 56 F.3d 85, 92 n.10 (D.C. Cir. 1995)).

Equal Protection of the Laws

The dispositive question is whether the City's refusal to issue a refund to the Homeowners in an amount equivalent to the amount forgiven similarly

situated Northern Estates property owners violated the Equal Protection Clause.[7] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Section 1 of the Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Generally speaking:

> the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Hayes v. Missouri, 120 U.S. 68, 71-72, 7 S.Ct. 350, 30 L.Ed. 578 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions." Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the

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[7] The City characterizes the Homeowners' arguments as seeking to "str[i]ke down" the entirety of the Resolution as unconstitutional. See Appellants' Brief at 25-28. But nowhere in the Homeowners' pleadings did they ask the trial court to strike down the Resolution, and the Homeowners do not make any such assertion on appeal. Instead, they request that the City issue them refunds equivalent to the amount forgiven other similarly situated property owners in Northern Estates.

> Equal Protection Clause requires a "rational basis for the difference in treatment."
>
> . . . Th[e] differential treatment [identified in the complaint] raised a concern of arbitrary classification, and we therefore required that the State provide a rational basis for it.

Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2153-54 (2008) (emphasis added). Further:

> The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
>
> [T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

* * *

> The appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. This standard is especially deferential in the context of classifications made by complex tax laws. In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

Nordlinger, 505 U.S. at 10-11 (emphasis added; citations, quotations, and alterations omitted). Thus, the level of scrutiny to be applied here is whether the City's decision rationally furthers a legitimate state interest.

The parties dispute the application of various

United States Supreme Court cases to this appeal. The most relevant[8] of those cases is Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336 (1989), in which the Supreme Court considered whether a county assessor's method of assessing property violated a landowner's equal protection rights. There, the Webster County, West Virginia, tax assessor valued recently sold real property on the basis of its recent purchase price while assessing similar property according to a previous assessment, with minor modifications. Id. at 338. That method of assessment ignored West Virginia law and "resulted in gross disparities in the assessed value of generally comparable property." Id. at 338, 345.

Writing for a unanimous Court, Chief Justice Rehnquist stated as follows:

> The use of a general adjustment as a transitional substitute for an individual reappraisal violates no constitutional

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[8] The City relies upon Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103 (2003) and Nordlinger. These cases are instructive on the general principles of equal protection but differ on their facts from this case to such an extent that they are not helpful in resolving the question in this appeal. The Resolution here is not analogous to the Iowa tax law at issue in Fitzgerald. See id. at 108. Nor, for the reasons discussed below, is the City's classification of the Northern Estates property owners on the basis of who did and did not have an unpaid balance on their assessment as of November 1, 2005, comparable to California's distinction in Nordlinger between new and older property owners. See Nordlinger, 505 U.S. at 12-13.

> command. As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. . . . [T]he constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

Id. at 343 (emphasis added). The Court held that the disparate treatment by West Virginia's nonuniform application of its property tax law violated the Equal Protection Clause, noting that the "Petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property." Id. at 344. The Court also held that "the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." Id. at 346. The Court then concluded that the State was required by the Constitution to refund to the complaining property owners an amount that would place them on equal footing with those property owners who benefited from the State's disparate treatment. See id. at 346 (citing numerous authorities).

The Supreme Court of the United States has not specifically addressed whether a municipality contravenes the Equal Protection Clause when it forgives an outstanding assessment owed by some property owners while, at the same time, it refuses

to refund an equivalent amount to similarly situated property owners who have already paid the same assessment in full. But the supreme courts of several states have addressed that exact question. We find those authorities instructive.

While there are at least three state supreme court cases directly on point, the most relevant of those cases is Armco Steel Corp. v. Department of Treasury, 358 N.W.2d 839, 843 (Mich. 1984). There, the Supreme Court of Michigan held unanimously that a State agency "failed to suggest any persuasive rational basis justifying its disparate treatment of those corporate taxpayers who paid their . . . assessments . . . and those who did not." The Armco Steel Court concluded that the "relevant class to be considered in analyzing the plaintiffs' equal protection challenge" is the whole group that was assessed the tax. Id. The court then held that it was contrary to the Equal Protection Clause for the State agency to subdivide that class into those who timely paid and those who did not, and then forgive the unpaid assessments for the untimely taxpayers without extending a refund to the timely taxpayers. Id. at 843-44.

The Supreme Court of Florida and the Supreme Court of Kansas have reached similar holdings on comparable facts involving special tax concessions and the forgiveness of unpaid tax liabilities. See Richey v. Wells, 166 So. 817, 819 (Fla. 1936) ("the [federal] constitutional requirement of equal protection of the tax laws prohibits the Legislature from selecting and classifying delinquent taxpayers as the beneficiaries of special tax concessions . . .

unless the same benefits are made equivalently available in some form or other to nondelinquent taxpayers."); State ex rel. Stephan v. Parrish, 891 P.2d 445, 457 (Kan. 1995) (holding that a tax law that forgave outstanding, untimely tax liabilities without conferring an equivalent privilege on timely taxpayers was "based solely on a characteristic or status of the taxpayer" and amounted to an unconstitutional and "unreasonable grant of a tax amnesty"). Other states have reached similar conclusions under their own constitutions and without consideration of federal law. See, e.g., State ex rel. Matteson v. Luecke, 260 N.W. 206 (Minn. 1935); State ex rel. Hostetter v. Hunt, 9 N.E.2d 676 (Ohio 1937); Snow's Mobile Homes, Inc. v. Morgan, 494 P.2d 216 (Wash. 1972).

In sum, the Equal Protection Clause allows broad discretion to state authorities in the creation and administration of a scheme of taxation, and a state authority's disparate treatment of similarly situated taxpayers will be found unconstitutional only if irrational, arbitrary, or capricious. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103, 108 (2003); Nordlinger, 505 U.S. at 10-11; Allegheny Pittsburgh, 488 U.S. at 344. But the Constitution requires a "rough equality in tax treatment of similarly situated property owners," and similarly situated property owners must "be treated alike . . . both in privileges conferred and in the liabilities imposed." Engquist, 128 S. Ct. at 2153; Allegheny Pittsburgh, 488 U.S. at 343. And, as our own Supreme Court has said, the Equal Protection Clause "does not reject the government's ability to classify persons or „draw lines' in the creation and

application of laws, but it does guarantee that those classifications will not be based on impermissible criteria or arbitrarily used to burden a group of individuals." Lake County Clerk's Office v. Smith, 766 N.E.2d 707, 712 (Ind. 2002) (quoting Phelps v. Sybinsky, 736 N.E.2d 809, 818 (Ind. Ct. App. 2000), trans. denied). The weight of authority holds that, for the purposes of forgiving an outstanding tax debt, a state authority acts arbitrarily when it differentiates between similarly situated, and identically assessed, taxpayers solely on the basis of those who have fully paid their debt and those who have not. See Richey, 166 So. at 819; Parrish, 891 P.2d at 457; Armco Steel, 358 N.W.2d at 843-44.

Classification and Disparate Treatment

There is no dispute between the parties that the July 2004 Barrett Law assessments were part of a "taxation scheme," and that the City had broad discretion to create classifications within that taxing scheme. See Nordlinger, 505 U.S. at 10-11. The "relevant class to be considered in analyzing the plaintiffs' equal protection challenge" is the whole group that was assessed the tax. Armco Steel, 358 N.W.2d at 843; see also Allegheny Pittsburgh, 488 U.S. at 346 ("the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings."). Thus, the relevant classification in this case includes all the Northern Estates property owners subject to the same July 2004 Barrett Law assessment, which is the foundation for our Equal Protection Clause analysis.

Nonetheless, the City contends on appeal that the Homeowners are not similarly situated to those property owners who had not paid in full as of November 1, 2005, for two reasons. First, the City notes that the Homeowners "carried no balances requiring continued administration by the City" as of November 1, 2005. Appellants' Brief at 10. Second, the City states that the Homeowners "offer no evidence to show they were similarly situated to the low-income families." Id. We address each argument in turn.

The City's first argument is not supported by legal authority. Rather, as we have already noted, the relevant classification for equal protection purposes is all the property owners in the group subject to the same July 2004 Barrett Law assessment. See Allegheny Pittsburgh, 488 U.S. at 346; Armco Steel, 358 N.W.2d at 843. The City cannot avoid an equal protection claim by subdividing the class and, in effect, re-defining the class as those who "carried no balances requiring continued administration by the City." Appellants' Brief at 10; see Armco Steel, 358 N.W.2d at 843-44 (holding that a state agency violated the Equal Protection Clause when it subdivided the class into who had timely paid assessments and those who had not). This attempt to re-define the relevant class not only ignores clear Supreme Court application of the Equal Protection Clause, see Allegheny Pittsburgh, 488 U.S. at 346, but also makes an irrational factual distinction because, under the Resolution, no further administration is

required of any assessment, whether partially paid or fully paid.

Similarly, the City's second argument against including the Homeowners in the class of all Northern Estates owners subjected to the same July 2004 tax does not address the proper legal standard. The City's disparate treatment of the Homeowners indicates an arbitrary classification, and it is, therefore, the City's burden to provide a rational basis for it. See Engquist, 128 S. Ct. at 2153-54. But the City has wholly failed to show that the property owners who chose to pay in installments are in any different income class than the Homeowners, who paid in a single lump sum.[9] The City has not shown that the Homeowners are not middle- to lower-income property owners subject to the same "financial hardships" as their neighbors. As such, this argument does not present a plausible reason for disparate treatment within the class.

The fact that some of the Northern Estates property owners had paid their July 2004 assessments in full and some had not before November 1, 2005, is, unless justified by the City, an arbitrary basis for deciding who does and does

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[9] The unstated assumption behind the City's argument is that only low-income property owners paid their Barrett Law assessments in installments and that only non-low-income property owners paid in full. It was the City's burden to rebut the Homeowners' prima facie showing of disparate treatment, see Engquist, 128 S. Ct. at 2153-54, but the City designated no evidence showing that the Homeowners did not include "middle to lower income participants" in the Northern Estates' Barrett Law program. See Appellants' App. at 350.

not benefit from the City's amnesty and forgiveness of that debt. See Engquist, 128 S. Ct. at 2153-54; Richey, 166 So. at 819; Parrish, 891 P.2d at 457; Armco Steel, 358 N.W.2d at 843-44. All persons within the class who are similarly situated for purposes of the assessment must be subject to the same ultimate liability for collection, unless the City has a rational basis related to a legitimate state interest to treat those persons differently. See Allegheny Pittsburgh, 488 U.S. at 343-46. Just as the costs of the Barrett Law project were "apportioned equally among all abutting lands or lots," I.C. § 36-9-39-15(b)(3), so, too, must be the forgiveness privileges conferred upon the Northern Estates property owners.

Having determined that the relevant classification here includes all the Northern Estates property owners subject to the same July 2004 assessment, we next consider whether the City's disparate treatment of the Homeowners is "plausibl[y]" related to, and "not . . . attenuated" from, the Resolution's expressed policy justification. If so, we must affirm the City's decision not to issue a refund to the Homeowners. See Nordlinger, 505 U.S. at 11. If, however, the policy expressed in the Resolution has no rational relation to the City's disparate treatment of the Homeowners, we must conclude that the City's disparate treatment of the Homeowners is arbitrary and unconstitutional. See Richey, 166 So. at 819; Parrish, 891 P.2d at 457; Armco Steel, 358 N.W.2d at 843-44.

Rational Relation to a Legitimate Governmental Interest

To determine whether the City's disparate treatment of the Homeowners has a rational relation to a legitimate governmental interest, we consider the text of the Resolution. See Giles v. Brown County, 868 N.E.2d 478, 481 (Ind. 2007). "To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." Nordlinger, 505 U.S. at 15. But when the text of a law "specifically declare[s] [its] purpose, the [law leaves] no room to conceive of any other purpose for [its] existence." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959). And, as part of our rational-basis review, "we of course consider legislative findings," if any exist, so long as those findings may "rationally . . . have been considered to be true by the governmental decisionmaker." United States v. Lopez, 514 U.S. 549, 562-63 (1995) (analyzing the constitutionality of a statute under the Commerce Clause); Nordlinger, 505 U.S. at 11 (noting that "legislative facts" may support the constitutionality of a statute under the Equal Protection Clause).

The full text of the Resolution is stated above. For purposes of our discussion, the relevant provisions are the following two "whereas" clauses:

> WHEREAS, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to

> lower income participants who most need sanitary sewer service in lieu of failing septic systems, and
>
> * * *
>
> WHEREAS, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis-Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

Appellants' App. at 350. The first statement in the Resolution declares that the transition from Barrett Law funding to STEP is justified to prevent undue financial hardship on middle- to lower-income families. The second statement notes that the decision to move from Barrett Law funding to STEP was based on a financial model that considered both current assessments and future needs.

The text of the Resolution identifies only one rationale for the City's decision to forgive outstanding Barrett Law assessments: the transition from Barrett Law funding to STEP is in the best interests of middle- to lower-income property owners. That is clearly a valid policy reason to transition from one funding program to another. But the Homeowners do not challenge the

City's decision to move from the Barrett Law to STEP. Rather, the Homeowners challenge whether the City can apportion costs equally among similarly situated property owners and then forgive outstanding assessments on an arbitrary date without refunding an equivalent amount to those property owners who had already paid the assessment in full as of that date. As discussed above, the Homeowners' claim "raise[s] a concern" of unconstitutional treatment. See Engquist, 128 S. Ct. 2153-54; Richey, 166 So. at 819; Parrish, 891 P.2d at 457; Armco Steel, 358 N.W.2d at 843-44. The City, having made findings and declared its purpose in the Resolution, is foreclosed from offering other subsequent explanations. See Allied Stores, 358 U.S. at 530 ("[when the text of a law] specifically declare[s] [its] purpose, the [law leaves] no room to conceive of any other purpose for [its] existence.").

Significantly, neither the Resolution's findings nor its forgiveness provision address the City's decisions not to issue a refund to the Homeowners. That is, the City has shown no nexus between the City's transition to STEP and its decision not to issue a refund to those Northern Estates property owners who had already paid their Barrett Law assessments in full as of November 1, 2005. Rather, there is a remarkable disconnect between those two decisions. The Resolution states that the plan to discontinue the Barrett Law method of funding considered current unpaid assessments, but the Resolution is silent with respect to any consideration given the fully paid assessments.

The close timing of the assessment in 2004 and the forgiveness in 2005 rendered even roughly equal treatment between the Homeowners and their forgiven neighbors unlikely. Again, the Equal Protection Clause does not require mathematical equality in the City's treatment of its citizens but only "rough equality." Allegheny Pittsburgh, 488 U.S. at 343. For some of the City's forty previous Barrett Law projects, little if any outstanding liability may remain. For other projects with outstanding debt, property owners receiving forgiveness may have actually paid more than their similarly situated, unforgiven neighbors once interest is taken into account. For others still, the amount of a similarly situated neighbor's forgiven debt simply may not be enough to raise a constitutional challenge.[10] In any event, the payment status of participants in other active Barrett Law projects is speculative and not before the court. We consider one case at a time, and we leave undecided—and express no view—whether this opinion has any application to other Barrett Law participants who are not parties to this appeal. See Cass R. Sunstein, One Case at a Time (1999).

Here, the City's reasoning has failed to take into account the particular facts of the Homeowners'

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[10] Any of these reasons might be adequate to hold that the Resolution is constitutional on its face. But, again, the Homeowners have not raised a facial challenge to the City's forgiveness decision. Rather, the only issue the Homeowners have raised, and the only issue we are considering, is whether the City's discrimination in who does and does not receive the benefits of the forgiveness is unconstitutional as applied to these particular facts.

case. The Homeowners each paid 100% of their assessment. The other Northern Estates property owners paid between 3.33% and 10% of the identical assessment before the Resolution forgave their remaining debt. Stated another way, the Homeowners have paid from ten to thirty times more than each of their similarly situated neighbors. See Allegheny Pittsburgh, 488 U.S. at 344 (finding an equal protection violation where the petitioners' property had been assessed at roughly eight to thirty-five times more than comparable neighboring property). And the City forgave well over ninety percent of the total assessment against the Northern Estates residents who chose to pay by installment but gave no relief to the Homeowners.[11] If the City's financial model did not account for the return of the fully paid assessments, that failure is not a rational basis for denying the Homeowners their constitutional rights. In other words, the financial model is not a policy justification in itself but merely reflects underlying policy choices. The question is not whether the financial model supports the transition to STEP but whether the policy enacted by the City, which results in such grossly disparate treatment of the Homeowners, can withstand constitutional scrutiny.

The United States Supreme Court has also noted that a state authority's use of classifications to protect "legitimate expectation and reasonable

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[11] The total owed by the Homeowners' neighbors who elected to make installment payments was $1,317,475. Those neighbors paid a total of $77,162 in installments, which amounts to 5.9 percent of the total installment debt owed by them.

reliance" interests provides "an exceedingly persuasive justification" for those classifications. Nordlinger, 505 U.S. at 13. But, here, the Resolution is contrary to the Homeowners' legitimate expectation and reasonable reliance interests. The Homeowners had the legitimate expectation that all property owners subject to the same assessment would pay the same amount, either outright or in installments, and they reasonably relied on the City's invitation to pay their assessments in full. But rather than collecting all of an equal assessment, the City opted to collect some and to forgive the rest, distinguishing property owners within the same group only by those who had already paid their assessments in full by an arbitrary date.

The City's refusal to grant the Homeowners' request for a partial refund of their Barrett Law assessments violates the Equal Protection Clause. It was the City's burden to demonstrate a plausible policy reason for its disparate treatment of the Homeowners, but the City has failed to demonstrate a rational basis for the differential treatment. See Engquist, 128 S. Ct. at 2153-54; Richey, 166 So. at 819; Parrish, 891 P.2d at 457; Armco Steel, 358 N.W.2d at 843-44. Instead, the City offers attenuated justifications for its failure to treat the similarly situated Homeowners with rough equality. See Ind. Appellate Rule 46(A)(8)(a); Nordlinger, 505 U.S. at 10-11; Allegheny Pittsburgh, 488 U.S. at 343-46. The City cannot lawfully confer privileges upon those property owners who chose to pay their Barrett Law assessments in installments and, at the same time, impose liabilities upon those

property owners within the same class who, at the City's invitation, paid their assessments in full. See Engquist, 128 S. Ct. at 2153. Accordingly, we agree with the Homeowners that the Resolution's only stated policy justification—to alleviate financial hardship on middle- to lower-income property owners—bears no rational relation to the Homeowners' equal protection claim. Thus, we must affirm the trial court's grant of summary judgment to the Homeowners.

The City's Subsequent Affidavit

In addition to the text of the Resolution, the City attempts to satisfy its burden of proof by designating the Garrard Affidavit, which was prepared for litigation, in response to the Homeowners' showing of disparate treatment. But the opinion of one Board member is not the opinion of the Board. With respect to statutes, our Supreme Court has established a clear "policy that[,] in interpreting statutes, we do not impute the opinions of one legislator, even a bill's sponsor, to the entire legislature unless those views find statutory expression." Utility Center, Inc. v. City of Fort Wayne, 868 N.E.2d 453, 459 (Ind. 2007) (quotation, citations, and alteration omitted). We see no reason why the same rule would not apply to the interpretation of a local resolution that has the force of law.

Again, there is "no room to conceive of any other purpose for [the Resolution's] existence" beyond the purpose stated within the four corners of the Resolution. See Allied Stores, 358 U.S. at 530.

Legislative facts may support the constitutionality of the Resolution, but only if those facts may "rationally have been considered to be true by the governmental decisionmaker." Nordlinger, 505 U.S. at 11. The Garrard Affidavit is not a substitute for the Board's consideration of legislative facts in the first instance. See Lopez, 514 U.S. at 563 n.4. We cannot impute Garrard's personal opinions, which are not expressed in the language of the Resolution, to the entire Board. See Utility Center, 868 N.E.2d at 459. The City may not backfill with parol evidence after-the-fact. See Allied Stores, 358 U.S. at 530. Nevertheless, we shall briefly address the two additional arguments raised by the City under the Garrard Affidavit.[12]

First, the City relies on the Garrard Affidavit to contend that the Resolution is rationally related to the City's legitimate interest in minimizing the administrative costs associated with the collection of outstanding and unpaid Barrett Law accounts. The Garrard Affidavit states that the Resolution

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[12] The City does not advance on appeal the reason Garrard offered to the Homeowners in his March 8, 2006, letter. In that letter, Garrard stated that while the November 1, 2005, forgiveness date "might seem arbitrary" to the Homeowners, it would be "unfair and inequitable" to remit a portion of their Barrett Law payments to them and not to every other Marion County property owner who had paid the whole of a Barrett Law assessment and who had a neighbor benefiting from the forgiveness provision. Appellants' App. at 318. Because the City does not make that argument on appeal, it is waived and we do not consider it. App. R. 46(A)(8)(a). In any event, scenarios involving other Marion County property owners are not before the court, and participants in other active Barrett Law projects are not similarly situated to the Homeowners.

was passed, in part, because "[t]he administrative costs to service and process remaining balances on Barrett law accounts . . . would not benefit the taxpayers." Appellants' App. at 353. But there is no evidence or suggestion that the cost to collect the outstanding and unpaid assessments from participants in active Barrett Law projects would be greater than the amount collected, a suggestion that is particularly dubious since a Barrett Law assessment constitutes a lien on the real estate assessed. See I.C. § 36-9-36-40. And, as we have already noted above, the City's professed concern with the costs of continued administration as a policy justification for disparate treatment is irrational because, under the Resolution, no further administration is required of any assessment, whether partially paid or fully paid. This purported justification is not a plausible policy reason for the City's disparate treatment of the Homeowners under the Equal Protection Clause. See Nordlinger, 505 U.S. at 10-11; Allied Stores, 358 U.S. at 530.

Even if the administrative costs justification were plausible and had been expressed in the Resolution, the only course of conduct consistent with equal protection would be for the City to forgive the assessments for the whole group of property owners who were assessed, including the Homeowners, in a manner that would attain, at a minimum, rough equality within the group. See Allegheny Pittsburgh, 488 U.S. at 343 (holding that the Equal Protection Clause requires rough equality in the tax treatment of similarly situated property owners); Armco Steel, 358 N.W.2d at 843 (concluding that the "relevant class to be considered

in analyzing the plaintiffs' equal protection challenge" is the whole group that was assessed the tax). As discussed above, the City did not take any steps to treat the Homeowners in a manner even roughly equivalent to their similarly situated neighbors.

Thus, the City has not shown that the Board considered administrative costs a factor when the Resolution was adopted in 2005. But most importantly, the City has not shown that its objective to avoid the cost of "continued administration" of outstanding Barrett Law accounts is plausibly related to its refusal to issue a refund check to each of the Homeowners. See Appellants' Brief at 10. A single payment to the Homeowners to settle their accounts would not constitute or require the "continued administration" of a "remaining balance[]." See id.; Appellants' App. at 353. There is no plausible correlation between the City's goal of minimizing administrative costs and the disparate treatment of the Homeowners under the Resolution.

Second, the City invokes the Garrard Affidavit to support its contention that the forgiveness provision is rationally related to its need for a clear line of demarcation between the two sewer-funding programs. The Garrard Affidavit suggests that the benefit of forgiveness received by some property owners is merely collateral to the City's primary interest in "simplifying things," namely, administration of the City's transition to STEP. See Appellants' App. at 353. But the City has not shown that its goal to simplify things or, as discussed

above, that its transition to STEP are plausibly related to the City's refusal to issue a single refund to the Homeowners.

The Homeowners have not been treated alike in the privileges conferred upon similarly situated property owners in the Northern Estates neighborhood. See Enquist, 128 S. Ct. at 2153. The City has failed in its burden to demonstrate that its difference in treatment rationally furthers a legitimate state interest. See Nordlinger, 505 U.S. at 11. The policy reasons and legislative facts as expressed in the Resolution bear no rational relationship to the City's exclusion of the Homeowners from the forgiveness provision. Likewise, even if we could consider the additional policy reasons proffered by the City after the fact, those reasons bear no rational relationship to the Resolution's stated goal of preventing undue financial hardship on middle- to lower-income families. Consequently, the City's differential tax treatment of the Homeowners violates the Equal Protection Clause. The trial court's judgment on that question is affirmed.

Relief

Finally, we briefly address the City's assertion that, "[i]f [the Homeowners] prevail, the remedy is to deny forgiveness to those taxpayers who were forgiven . . . , not [to] give [the Homeowners] a refund." Appellants' Brief at 30. That position is contrary to well established equal protection law. As the United States Supreme Court has held:

> A taxpayer in this situation may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property raised. "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." Hillsborough[v. Cromwell, 326 U.S. 620, 623 (1946)], citing Sioux City Bridge Co.[v. Dakota County,] 260 U.S. [441,] 445-447 [(1923)]; Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931); Cumberland Coal Co.[v. Bd. of Revision of Tax Assessments,] 284 U.S. [23,] 28-29 [(1931)].

Allegheny Pittsburgh, 488 U.S. at 346 (first alteration original). That is, when a taxpayer is denied equal protection of the laws through a state authority's collection of assessed taxes, the proper remedy is not to penalize everyone equally but to grant the benefit given to others to the complaining taxpayer. Thus, having denied the Homeowners equal protection of the laws by granting other similarly situated property owners a benefit not conferred upon the Homeowners, the City is required by the Constitution to refund to the Homeowners an amount that will place them on equal footing with their similarly situated neighbors

who benefited from the City's disparate treatment.[13] See id.; see, e.g., Armco Steel, 358 N.W.2d at 843-44.

Conclusion

On the facts of this case, and following the unanimous decision of the Supreme Court of the United States in Allegheny Pittsburgh, we hold that the City's disparate treatment of the Homeowners does not approach a "rough equality in tax treatment of similarly situated property owners." See Allegheny Pittsburgh, 488 U.S. at 343. Equality in tax treatment requires that a tax be applied uniformly among similarly situated property owners including both the assessment and the collection. Here, the relevant class is all property owners within Northern Estates who were subject to the same July 2004 Barrett Law assessment. We hold that the City has failed to demonstrate a rational relation to a legitimate state interest for discriminating against those property owners who had paid that assessment in full before the Resolution forgave all assessments due and owing from and after November 1, 2005. We also hold that, in light of the City's unconstitutional discrimination against the Homeowners, established equal protection case law entitles the Homeowners to relief through a refund.

And, like the Supreme Court of Michigan in Armco Steel, we conclude that the Resolution here

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[13] The trial court, in its summary judgment order, determined a per person value to be refunded. The City does not challenge that valuation on appeal.

arbitrarily creates two classes of Barrett Law property owners: those whose property was assessed and who—at the City's invitation— paid the assessment in full, and those whose property was assessed but whose assessment was forgiven because—also at the City's invitation—they opted for an installment payment plan. See Armco Steel, 358 N.W.2d at 843-44. The City's disparate treatment, based entirely on the chance election to pay or not to pay the assessment in full as of November 1, 2005, has no rational relation to a legitimate state interest.

Accordingly, we affirm the trial court's summary judgment for the Homeowners on their Equal Protection claim, and we affirm the court's denial of the City's motion for summary judgment. We also affirm the money judgment entered by the trial court for the Homeowners, the amount of which the City does not dispute on appeal. And we remand this case to the trial court with instructions to determine the appropriate amount of prejudgment interest to which each Homeowner is entitled.

Affirmed and remanded with instructions.

KIRSCH, J., and BARNES, J., concur.

APPENDIX D

STATE OF INDIANA
SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 • FAX 317-232-8365

KEVIN S. SMITH, Clerk
RONALD WAICUKAUSKI
301 MASSACHUSETTS AVENUE
INDIANAPOLIS, IN 46204-2167
Fax Number: 317-633-8797

Cause Number
49A02-0901-CV-00084
Lower Court Number:
49D110706CT26050

THE CITY OF INDIANAPOLIS, ET AL.
V.
ARMOUR, CHRISTINE, ET AL

You are hereby notified that the COURT OF APPEALS has on this day 2/17/10 APPELLANT'S PETITION FOR REHEARING DENIED.

FOR THE COURT, JOHN G. BAKER, ALL PANEL JUDGES CONCUR.

WITNESS my name and the seal of said Court, this 17TH day of FEBRUARY, 2010

CHIEF JUDGE
KM 2/18/10

APPENDIX E

Filed 10/9/2008

STATE OF INDIANA
COUNTY OF MARION

IN THE MARION SUPERIOR COURT
CIVIL DIVISION,
ROOM ELEVEN

CAUSE NO. 49D110706CT26050

THE CITY OF INDIANAPOLIS, ET AL.

V.

ARMOUR, CHRISTINE, ET AL

ORDER

Comes now the Court, and, having taken this matter under advisement at the close of the hearing on September 29, 2008, on the parties' Motions for Summary Judgment, at which hearing the parties appeared by counsel, and the Court, having heard

the arguments of counsel, having read the memoranda submitted in support of and in opposition to said Motions, and, being duly advised in the premises, now finds as follows:

(1) Defendants' Motion for Summary Judgment filed with the Court on May 29, 2008 is Denied.

(2) Plaintiffs' Motion for Summary Judgment filed with the Court on March 11, 2008, is Granted.

(3) Counsel for the Plaintiffs shall submit a proposed Judgment Entry to the Court within twenty (20) days of the date of this Order.

ALL OF WHICH IS ORDERED THIS 9TH DAY OF OCTOBER 2008.

Judge, Marion Superior Court
Civil Division, Room Number Eleven.

APPENDIX F

DEC 4, 2008

STATE OF INDIANA
COUNTY OF MARION

IN THE MARION SUPERIOR COURT
CIVIL DIVISION,
ROOM ELEVEN

CAUSE NO. 49D110706CT26050

CHRISTINE ARMOUR, ET AL
V.
THE CITY OF INDIANAPOLIS, ET AL.

JUDGMENT ENTRY

The Court having taken this matter under advisement at the close of the hearing on September 29, 2008, on the parties' Motions for Summary Judgment, and having issued its Order of October 9, 2005 denying the Defendants' Motion for Summary Judgment, and having granted Plaintiff's Motion for

Summary Judgment. now hereby enters judgment as follows:

1. Judgment is -entered in favor of each of the following Plaintiffs and against the Defendant City of Indianapolis in the principal amount of $8,965.73: (1) Christine Armour; (2) David A. Bird; (3) Joseph and Rozzetta Cumberlander; (4) Alice J. Detzler; (5) James and Renate Donahue; (6) Kenneth J. and Mary Jane Eiler; (7) Sandra Kay Hevron; Personal Representative of the Estate of Ruth Virginia Enmeier; (8) David A. and Heather R. Fellabaum; (9) Nancy Lee Gahl; (10) David M. Gibson, Trustee of the Margaret Lockhart Gibson Trust; (11) Ingeborg Haesloop, Executrix of the Estate of Robert E. Haesloop; (12) Robert E. and June E. Holt; (13) Frank S. and Jeanne A. Johnson; (14) Edward J. and Erika M. Kelly; (15) Leonard and Colleen E. Kirksey; (16) Carlos 0. and Katrina V. Kreamer; (17) Frank P., Jr. and Bettye Jo Lloyd; (18) William H., Jr. and Sue Ellen Main; (19) Wilma M. Marley; (20) Geoffrey H. and Dinah J. Michels; (21) Norma Jean Morgan; (22) Zora Nathan; (23) Frank D. and Sharon L. Neese; (24) Donnis D. Patton, (25) Viesturs M. and Carolyn Purvlicis; (26) Susan Moe, Co-Executrix of the Estate of Margaret Rosemary .Richard;-. (2-7) M: Evelyn Rogers; (28) Mrs. Clifford A. Short; (29) Louis .J.,. Jr. and Linda J. Urbancic; and (30) Mary B.Williams.

2. Judgment is entered in favor of plaintiff Alvera C. Buker and against the Defendant City of Indianapolis in the principal amount of $4,329.73.

3. Accordingly, the total principal amount of the judgment entered in favor of the Plaintiffs and against the City of Indianapolis is $273,391.63.

5. Further, pursuant to 42 U.S.C. § 1988, Plaintiffs are hereby awarded their reasonable attorneys' fees in the amount of $105,153.00 and their expenses, in the amount of $2,369.53

Judge, Marion Superior Court
Civil Division, Room Number Eleven.

APPENDIX G

BARRETT LAW
IND. CODE § 36-9-39-15

Sewage works for use by property owners along street, alley, or other public place; requirements

Sec. 15. (a) The requirements listed in subsection (b) apply only if the municipal works board finds that the sewage works to be constructed:

(1) are intended and adapted only for local use by property owners along the line of the street, alley, or other public place on which the sewage works are constructed; and

(2) are not intended or adapted for receiving sewage from collateral sewers.

(b) The following requirements apply to the sewage works if the conditions of subsection (a) are satisfied:

(1) The abutting lots, parcels, and tracts of land shall be assessed primarily for the cost of the sewage works.

(2) The cost of the sewage works shall be primarily estimated according to the total number of lots abutting on the line of the works and served by the sewage works.

(3) The costs shall be primarily apportioned equally among all abutting lands or lots.

However, adjustments shall be made as provided by section 16 of this chapter.

APPENDIX H

CITY-COUNTY GENERAL ORDINANCE NO. 107, 2005

Sec. 671-22. Connection permits.

(d) Permit fees; refunds. The following permits and payment of the associated fees are required to make a connection to the city's sanitary or combined sewer system. The board of public works shall establish the amount of the following fees by regulation and may revise the amount of such fees but not more than once each calendar year:

(1) The building sewer permit inspection fee shall cover the costs of mandatory inspection by the division of compliance of the building sewer and its connection, and any reinspection that may be necessary because of remedial construction;

(2) The plan review fees shall cover the costs for the amount of time that is required for the division of compliance to administer and review plans submitted under this article for conformance with the department's standards and specifications;

(3) The administrative fee shall cover the department's costs related to administration, planning, and review for the sewer service agreement; and

(4) The connection fee of two thousand, five hundred dollars ($2,500) per EDU will be assessed for all new connections to the sanitary or combined sewer system at the time of acquiring a building permit. A new connection would include new sewer service or modification of an existing sewer service agreement; however, replacement or repair of an existing individual building sewer that does not increase EDU's would not constitute a new connection.

The permit fee paid under this article shall not be refunded upon and in instances where the permit was issued in error, either because it was not required by law, or because a permit for the same activity previously had been issued and was in force at the time the second permit was applied for and issued.

APPENDIX I

BOARD OF PUBLIC WORKS RESOLUTION NO. 101, 2005

A RESOLUTION FORGIVING BARRETT LAW ASSESSMENTS

WHEREAS, The Board of Public Works (Board) is authorized by Indiana Code (IC) 36-9-39 to administer 'Barrett Law Funding for Municipal Sewer' program under which the Board approves all Barrett Law projects within the City of Indianapolis – Marion County, including individual assessment amount per parcel, and

WHEREAS, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems, and

WHEREAS, The Department of Public Works (DPW) has a proposed rate and fee increase package to the City-County Council for approval to continue to address there-capitalization, expansion, operation and maintenance, and regulatory requirements of the City's sanitary sewer system which was approved by the City-County Council on

October 31, 2005 (Proposal No. 535 as amended) effective on January 1, 2006, and

WHEREAS, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis – Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

NOW, THEREFORE, BE IT RESOLVED that the Board of Public Works hereby forgive all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005 forward to the Department of Public Works via the Barrett Law Assessment Bureau.

ADOPTED this 7th day of December, 2005.

Board of Public Works

/s/
James A. Garrard, Chairperson

/s/
Kip Tew, Member

/s/
Roger Brown, Member

/s/
Gregory Taylor, Member

/s/
Sue Schalk, Member

ATTEST: /s/
Kimberly Frye, Board Secretary

APPROVED AS TO FORM AND LEGALITY:

/s/
R. Matt Senseny, Board Counsel
Assistant Corporation Counsel

OPPOSITION BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *ET AL.*,
Petitioners,

v.

CITY OF INDIANAPOLIS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Indiana Supreme Court's opinion in this case. That opinion is reported at 946 N.E.2d 553.

STATEMENT OF THE CASE

A. The City of Indianapolis Forgave Long-Term, Financed Barrett Law Debts as Part of its Transition to a New Taxation Scheme for Future Sewer Construction.

Barrett Law financing is a taxation scheme authorized by Indiana statute wherein the cost of capital improvements including sewer projects are divided among all benefiting homeowners. (Pet. App. 3a.) Barrett Law financing had long been used in Indianapolis for sewer construction and allowed homeowners to either pay up front or finance their assessments over ten to thirty years. (Pet. App. 4a-5a.)

In their Petition, the movants wrongly assert that the City "adopt[ed] a new method of financing [their] sewer project." (Pet. at 2.) Instead, the City adopted a new funding method for future sewer installation projects. (Pet. App, 4a-5a, 44a.) The change was necessary because Barrett Law financing was not a viable option for much needed installations of sewers in economically-depressed neighborhoods served by septic systems. (Pet. App. 4a-5a.) This new funding

system lowered homeowners' up-front fees to a flat $2500 and abandoned long term financing options. (Pet. App. 5a.)

When the City decided to leave the Barrett Law financing scheme, the City had to determine how to handle payments still owed for more than forty prior projects financed through the Barrett Law scheme which were still in collection. (Pet. App. 5a.) These projects involved thousands of taxpayers. (Pet. App. 6a.) The Board of Public Works decided to forgive and assume all remaining debts. (Pet. App. 5a.) Forgiving the debt benefited the City and its ratepayers in several ways:

- Forgiveness created a clear demarcation between the old and new financing methods.
- Forgiveness eliminated administrative costs for administering and collecting those debts over almost thirty years.
- Forgiveness removed the possibility of foreclosure for homeowners unable to pay the debt—the remedy provided by state statute as delinquent amounts became tax liens encumbering the properties. *See* IND. CODE § 36-9-38-28 (2011). At the time, Indiana ranked first in the nation in foreclosed homes. *Foreclosures in Indiana hit new high; Lost jobs, bankruptcies, lending cited as state remains No. 1 in U.S.*, INDIANAPOLIS STAR, March 18, 2006, at 1A.
- Through forgiveness, the City also aspired to aid homeowners who were overly burdened by the prior Barrett Law assess-

> ments. That is, the City considered the existence of a taxpayer's election to pay a Barrett Law assessment over time as evidence of a homeowner's ability to pay. (Pet. App. 4a-5a.)

Forgiving the debt without issuing refunds to the lump sum payers also benefitted the City because it protected the City's limited resources and left at least part of the sewer construction costs with the homeowners who directly benefitted from the construction.

B. Petitioners Are Homeowners Who Did Not Finance their Barrett Law Taxes and Therefore Did Not Benefit from the Forgiveness.

Petitioners are thirty-one homeowners seeking refunds of taxes they paid pursuant to Indiana's Barrett Law for building a sanitary sewer in their neighborhood before Indianapolis changed its funding system. (Pet. App. 4a-6a.) Petitioners live in the final neighborhood financed under the Barrett Law financing scheme. Each homeowner was assessed $9,278 as their *pro rata* share of the sewer construction costs. (Pet. App. 3a.)

Petitioners all elected to pay up front, in one lump sum. (Pet. App. 4a.) When forgiveness occurred the following year, homeowners who selected the thirty-year option had paid only $309.27. (Pet. App. 3a-4a, 48a.) The funds Petitioners paid for their sewer project have already been spent on sewer construction; yet, Petitioners contend the City should compensate them because it forgave the amounts owed by their neighbors who financed the sewer assess-

ments instead of paying in a lump sum. (Pet. App. 5a, 19a.)

In overturning a grant of summary judgment in favor of Petitioners, the Indiana Supreme Court found that Petitioners failed to establish the City's decision to forgive Barrett Law debts without refunding lump sum payers was arbitrary. (Pet. App. 15a-19a.) Instead, the court found this legislative line drawing was rational because it clearly ended the City's reliance on Barrett Law, eliminated costs of continued administration of Barrett Law collections over almost thirty years, removed the threat of foreclosure for non-payment, and aimed to aid poor homeowners. (Pet. App. 15a-19a.)

C. The Same Claims Are Also Being Raised by a Class of 1,459 Taxpayers in Another Suit.

A class of similarly situated homeowners from all Barrett Law projects where some homeowners received forgiveness also sued the City in an action pending in the Southern District of Indiana. *Cox v. City of Indianapolis*, 2010 U.S. Dist. LEXIS 58876 (S.D. Ind. June 14, 2010). In that case, the district court followed the now vacated Indiana Court of Appeals' *Armour* opinion and found that forgiveness without corresponding refunds denied equal protection. *Id.* at *6-19. The district court found 1,459 taxpayers in twenty-one Barrett Law projects should have been refunded $2,783,702, which amounts to average refunds of $1,908. *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011) (adopting City's calculation of damages, available on Pacer under cause 1:09-cv-435-TWP-MJD, doc. 98-1). Final judgment has not been issued in that cause.

SUMMARY OF THE ARGUMENT

Petitioners have presented no circumstances meriting certiorari. This case involves unique facts particular to Indiana's Barrett Law financing system for sewer construction and Indianapolis's one-time effort to extricate itself from that scheme. The underlying law regarding how to apply the mere rational basis equal protection analysis to differential treatment in state tax schemes has already been established through *Alleghany Pittsburgh* and *Nordlinger*. Thus, any decision would primarily address these facts, which are not likely to be repeated.

The Indiana Supreme Court correctly found that Petitioners could not establish that the decision to forgive Barrett Law debts without corresponding refunds to lump sum payers was arbitrary. Instead, this legislative line drawing was rational because it clearly ended the City's reliance on Barrett Law, eliminated administrative costs of continued Barrett Law collections over almost thirty years, removed the threat of foreclosure for non-payment, aided financially struggling homeowners, and achieved these goals at a price the City was willing to pay.

There is no conflict between the Indiana Supreme Court's decision and Petitioners' state court cases on forgiveness of illegal or delinquent taxes. Instances where courts have found tax policies arbitrary because a tax was illegal or the forgiveness only benefited delinquent payers are fundamentally different from the present forgiveness of an unchallenged tax. Moreover, the Indiana Supreme Court properly reconciled the City's forgiveness with this Court's

guidance on arbitrary taxation treatment in *Allegheny Pittsburgh*. The court recognized that the more apt precedent from this Court was *Nordlinger* which permitted differential treatment of very similar taxpayers because the legislative line-drawing in that case was rational. The present case involves reasoned line drawing between thousands of homeowners, not arbitrary or invidious discrimination.

Petitioners' also argue for certiorari based on their contention that the City improperly factored "preserving ... limited resources" into its legislative line drawing. Petitioners are correct that all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended. However, Petitioners have presented no authority showing this consideration conflicts with the jurisprudence of this Court, any circuit court, or any other court with precedential effect. Instead, the limitations of the municipal fisc are always a relevant consideration. Legislative bodies do not have unlimited financial resources and are routinely forced to weigh equity and resources with other legislative goals.

REASONS FOR DENYING REVIEW

I. The Indiana Supreme Court's Holding Does Not Conflict with Other State Court Holdings

Petitioners' opening argument for certiorari review is a purported conflict with the decisions of four state courts--interpreting the Equal Protection Clause. However, the alleged conflict is illusory as these

cases are readily distinguishable. Those cases involve tax forgiveness without refunds under very different circumstances—because the tax was illegal or because the taxpayers were in default. While the taxing entities may have had no rational bases in those dissimilar circumstances, a rational basis exists in the present case.

While alleging a conflict with four state courts, Petitioners only develop at any length the alleged conflict with *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984). *Armco Steel* is readily distinguishable because it deals with an illegal tax and no party ever put forth a rational basis for differential treatment. *Id.* at 841, 843. There, after a tax was deemed improper, the state did not collect unpaid taxes, but refused to refund amounts already paid. *Id.* at 841. In ending this unequal treatment, the Michigan Supreme Court found there to be no "natural distinguishing characteristic" allowing the state to treat taxpayers who paid the tax before it was found illegal differently from those who had not yet paid. *Id.* at 844.

As the Indiana Supreme Court observed, the illegality of the tax in *Armco Steel* was significant to the Michigan court's decision that the refusal of refunds was a violation of equal protection. (Pet. App. 30a-31a.) "[T]here was in *Armco Steel* a sense of foul play present in that the initial assessment of the franchise fees had been held to be illegal, and although the treasury department gave relief to some who were assessed illegally, it did not grant relief to others who were also assessed illegally." *Id.* Petitioners attempt to disregard this legal versus non-legal tax distinction by incorrectly claiming that the Michigan court specifically found it irrelevant. (Pet.

at 14.) However, the cited "*non sequitor*" provision in the *Armco Steel* opinion only finds it is irrational to discriminate based on whether taxpayers paid an illegal tax before or after it was found illegal. *Armco Steel*, 358 N.W.2d at 844.

The City makes no claim that there is a rational basis to retain an illegal tax. However, the present forgiveness of long-term financed, subsequently owed payments did not imply any impropriety in the underlying tax assessment. (Pet. App. 31a.) Petitioners were assessed equally and all money paid was "used to fund [the sewer construction directly benefiting their properties] and has already been spent in constructing those sewers." (Pet. App. 2a, 19a.)

Armco Steel should also be differentiated because the Michigan Supreme Court cited two independent state grounds for its opinion. *Armco Steel*, 358 N.W.2d at 842 (citing Michigan's State Constitution's Equal Protection Clause and Uniformity of Taxation Clause.) While the Michigan court indicates the analysis is the same, the invocation of the Uniformity of Taxation Clause suggests a strong state partiality to "equal treatment of similarly situated taxpayers." *Id.* The Fourteenth Amendment's Equal Protection Clause, however, permits differential treatment where there is a rational basis for the difference. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference[.]").

In addition to their discussion of *Armco Steel*, Petitioners briefly enumerate three cases wherein state

courts found that forgiveness of delinquent taxes violated equal protection. (Petition at 12, citing *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); and *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936).) At most, these cases stand for the proposition that it is arbitrary to differentiate between delinquent taxes and already paid taxes. While there may be no rational basis for that distinction, those cases create no conflict with the Indiana Supreme Court's finding that the City's forgiveness of long-term financed, subsequently owed payments without refunds of legitimate tax payments that had already been spent on improvements directly benefitting the taxpayers survives mere rational basis scrutiny.

Moreover, unlike the present case, all of the cited state cases include patent unfairness—retention of an illegal tax and favorable treatment to delinquent taxpayers. Despite Petitioners' pains to present this case as equally iniquitous, it simply is not. Just like all prior participants in the City's Barrett Law sewer projects, Petitioners paid no more than their fair, *pro rata* share of the sewer construction cost. (Pet. App. 3a.) All of their payments were spent on sewer construction benefiting their land. (Pet. App. 19.) As the district court found in *Cox*, the Petitioners are requesting "extending a tax assessment forgiveness *windfall*, which will be paid by taxes levied on all of the City's taxpayers." *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011). While Petitioners did not receive the windfall forgiveness which they claim was necessary to end the Barrett Law program, they did receive the benefit of the tax and were treated the same as genera-

tions of prior Barrett Law taxpayers. This is not equivalent to the arbitrary, demonstrably unfair taxpayer discrimination that occurred in *Armco Steel*, *Parrish*, *Perk*, or *Richey* and does not violate the Equal Protection Clause.

II. Conflict with an Interlocutory Order from a District Court Does Not Merit Certiorari

Petitioners also tout the conflict between the Indiana Supreme Court's opinion and the unpublished memorandum decision of the Southern District of Indiana in *Cox v. Indianapolis*, 2010 U.S. Dist. LEXIS 58876 (S.D. Ind. June 14, 2010). However, this is not a conflict requiring intervention by this Court because a "district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply." *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993). This Court's own rules do not recognize a conflict with a district court as among the likely bases for certiorari review. *See* SUP. CT. R. 10. The *Cox* judgment is only an interlocutory order which may still be revisited before final judgment. Finally, any error in the *Cox* analysis can still be rectified through an appeal to the Seventh Circuit before the case has any precedential value. Only if a conflict persists after that process, then there may be cause for certiorari review.

III. The City Properly Considered Fiscal Responsibility in its Legislative Line Drawing

Without alleging a conflict with any case, Petitioners assert that the City's reasons for its legislative line-drawing lack merit. (Pet. 18-20.) Even if correct, it is unclear how the allegation could support certiorari. *See* SUP. CT. R. 10. Such a determination by its nature would be fact specific and unique to Indiana's taxing scheme and the City's one-time forgiveness. Moreover, their argument is erroneous because fiscal considerations can be a proper consideration in differential treatment. *See Bowen v. Gilliard*, 483 U.S. 587, 596 (1987). The Constitution gives courts "no power to impose upon [legislatures] their views of what constitutes wise economic or social policy, by telling it how to reconcile the demands of needy citizens with the finite resources available to meet those demands." *Id.* A court's entanglement with a city's fiscal decisions would implicate both separation-of-powers and federalism concerns.

Petitioners do not substantially challenge any of the City's reasons for forgiveness, but argue it was irrational to draw the line at forgiving long-term financed, subsequently owed payments without also refunding payments already received. (Pet. 18-20.) Admittedly, their solution of additional refunds would accomplish the same goals, but would have cost the city millions of additional dollars as a result. (Pet. App. 84; *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *3, *8 (S.D. Ind. June 15, 2011).)

It is entirely unfair to say the City drew the line where it did because "the City wanted to keep the

money." (Pet. 18.) There was no money to keep—again, all of Petitioners' tax payments were spent on sewer improvements that directly benefitted their own properties. (Pet. App. 19a.) This was not a question of hoarding money, but instead a legislative choice to limit how much money would have to come from other tax sources in order to end the reliance on Barrett Law financing.

Moreover, Petitioners had already received exactly the benefit from their tax payment that was indicated at the time of assessment and the same benefit that generations of prior Barrett Law taxpayers received. (Pet. App. 19a.) The only thing they did not receive was the "windfall" given to their neighbors for the purposes of ending Barrett Law financing. *Cox v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 63748, *8 (S.D. Ind. June 15, 2011).

In sum, Petitioners are asserting that if the City wanted to rid itself of the specter of the unpopular Barrett law financing at any time during the next thirty years while payments were still owed, the only possible avenue was to also provide refunds to others who paid into the same project. However, a legislative body must be permitted to weigh other factors such as cost, equities, and other legitimate municipal goals such as protection of the City's water supply through the elimination of aged septic tanks, in order to arrive at practical solutions. As this Court and the Indiana Supreme Court have both recognized, the government's limited resources are necessarily part of this decision-making process. (Pet. App. 11a-12a.)

IV. The Opinion Is also Consistent with this Court's Jurisprudence

A. Forgiveness without refunds survives rational basis scrutiny.

Despite Petitioners efforts to gain traction by suggesting misapplication of this Court's precedent, the Indiana Supreme Court properly applied this Court's previous decisions. Petitioners do not challenge the state court's holding that the forgiveness without refunds is subject to mere rational basis review. (Pet. App. 8a-9a.) As this Court has found, "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." *Engquist*, 553 U.S. at 602 (internal quotation omitted). A "classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

Under that standard, the City had "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). If facts do not preclude a rational basis proffered by the government, the

government's actions must be found constitutional. *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 110 (2003).

As the Indiana Supreme Court found, the City had rational reasons for forgiveness without refunds. First, "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." (Pet. App. 16a.) "Support of the poor has long been recognized as a public purpose." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 515 (1937). Second, as discussed above, the City could properly consider preservation of limited resources. (Pet. App. 18a-19a.)

B. There is no conflict with Allegheny Pittsburgh *or* Nordlinger.

Contrary to the assertions of Petitioners and their *amici curiae*, the opinion is a useful elucidation of how to square this Court's opinion in *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n*, 488 U.S. 336 (1989) with *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

The Indiana Supreme Court correctly observed that the differential treatment in *Nordlinger* of similarly situated property owners based on when they bought their property was permissible because it furthered a policy intended to protect neighborhoods and expectation interests of long-term homeowners by not tying their taxes to market values. *Nordlinger*, 505 U.S. at 12-13, 16. However, the same differential treatment of new property owners was found unconstitutional in *Allegheny Pittsburgh* because the dis-

crimination did not further any governmental interest, treated only a small group of property owners differently, and was in direct contravention of state law requiring equality in taxation. *Allegheny Pittsburgh*, 488 U.S. at 343-46.[1]

While Petitioners and Amicus Taxpayers Union represent that the Indiana Supreme Court "erred in its reading" of *Nordlinger* and *Allegheny Pittsburgh* (Pet. 21), their real contention is that the Indiana Supreme Court misinterpreted Indiana law to find the differential treatment more akin to *Nordlinger* than *Allegheny Pittsburgh* (Pet. 21, 23; Taxpayers Union Brief at 13-14.) In their discussion of both cases, Petitioners represent that the Indiana statute under which Petitioners were taxed "expressly required" equal taxation. (App. 21, 23.) In effect, Petitioners are attempting to liken the City to the rogue tax assessor in *Allegheny Pittsburgh* whose discrimination was irrational and did not follow state mandates of equality in taxation.

However, there has never been a finding that Indiana State law requires continued equity in Barrett

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[1] Petitioners suggest this case would be a good vehicle for clarification on class-of-one equal protection jurisprudence. (Pet. 24-25.) However, this is not a class-of-one case as the city drew lines among thousands of taxpayers. (Pet. App. 6a.) The Indiana Supreme Court properly rejected Petitioners' efforts to invoke class-of-one cases where small groups without differentiating characteristics were treated differently because the present forgiveness without refunds involved legislative line-drawing between large, readily identifiable groups of taxpayers. (Pet. App. 23a-24a.) Whether viewed as a distinct branch of equal protection jurisprudence or merely a group of analogous cases, the Indiana Supreme Court properly differentiated those cases from the present circumstances.

Law taxation. This is a separate, state-law legal issue which is part of the remaining state legal claim and has not yet been ruled upon. (Pet. App. 50a.) The answer is also far from clear as the Barrett Law statute only requires equality in initial assessments. IND. CODE § 36-9-39-15. Thereafter, long-term financing will create inherent inequalities. Also, a related statute indicates amounts can be "credited, eliminated, or reduced" and those amounts can either be reapportioned to other taxpayers or borne by the municipality. I.C. § 36-9-39-17(c). These questions of Indiana statutory interpretation are not proper for certiorari. When this improper state law claim is removed from Petitioners' argument, Petitioners' allegation of a conflict with this Court all but disappears.[2] The Indiana Supreme Court properly followed the mandates of this Court.

V. Petitioners' Question Presented Is Premised Upon a Faulty Presumption that Petitioners Would Be Entitled to Refunds if Equal Protection Was Violated

Finally, even if successful, Petitioners would not benefit from certiorari review because the only permissible remedy for an equal protection violation

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[2] Petitioners raise the same unanswered question of Indiana law to claim that their "legitimate expectations" for taxation were offended. (Pet. 22-23.) However, it is not clear that Barrett Law taxpayers had a legitimate expectation that their neighbors would not receive windfall forgiveness. The only legitimate expectation was that the initial assessment would be equal and that taxes would be spent on construction of sewers benefitting their property. I.C. § 36-9-39-15. Those legitimate expectations have been met.

would be to strike down the forgiveness. Petitioners' question presented is premised upon the assumption that they would be entitled to refunds if an equal protection violation occurred. (Pet. i.) This Court, however, has instructed that when fashioning a remedy for an equal protection violation, the remedy must not disrupt the intent of the enacting body:

> Although the choice between 'extension' and 'nullification' is within the constitutional competence of a federal district court, and ordinarily extension, rather than nullification, is the proper course, **the court should not, of course, use its remedial powers to circumvent the intent of the legislature**, and should therefore measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (internal quotations omitted, emphasis supplied).

Petitioners have no evidence indicating the City's Board of Public Works would have spent millions of additional dollars to provide refunds—or even had resources available to pay for refunds—if they knew forgiveness would otherwise violate equal protection. Quite the opposite, the evidence in the class action suit includes affidavits from every board member stating they would not have approved forgiveness if they knew refunds were also required. *See Cox v. City of Indianapolis*, 1:09-cv-435-TWP-MJD (affidavits available on Pacer in doc. 57.) All of Petitioners' payments had already been spent on sewer construc-

tion. (Pet. App. 19.) Therefore, the only permissible remedy would be to invalidate the forgiveness.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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October 14, 2011

REPLY BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

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REPLY BRIEF FOR PETITIONERS

Respondents' attempts to deny the existence of a conflict are insubstantial. The constitutionally relevant question is not why a taxing authority grants relief to certain taxpayers; rather, it is why such relief is *withheld* from those who are similarly situated. Four state high courts (and a federal district court considering this exact Indianapolis scheme) agree that a taxpayer's having paid in full is not a rational basis for denying relief.

Moreover, respondents do not dispute that defending a discriminatory taxation scheme on "cost-saving" grounds would have widespread application to countless taxing authorities. Rather, they acknowledge that saving money is the only reason they refused to provide tax refunds to petitioners (Br. in Opp. 6, 11) and contend that "limitations of the municipal fisc are *always* a relevant consideration" (*id.* at 6 (emphasis added)). The sweeping breadth of that position—which the Indiana Supreme Court embraced (Pet. App. 18a-19a)—is reason enough to grant certiorari.

So too for respondents' contention (at 14) that the Indiana Supreme Court did an admirable job of "squar[ing]" purported inconsistencies between *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), and *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992). The Court's opinion in *Nordlinger* expressly disclaimed such conflict. Only this Court may determine whether one of its decisions should be, as the court below said (Pet. App. 28a), "narrowed to its facts." Respondents' suggestion that Indiana state law somehow *contemplates* inequality in taxation is dispatched simply by reading the statute

in question. Finally, respondents' claim that petitioners would not receive a refund is contradicted by *Allegheny Pittsburgh* and beside the point.

I. Respondents Do Not (And Cannot) Distinguish Any Of The State Supreme Court Decisions That Conflict With The Decision Below

Four state supreme courts have held that the Equal Protection Clause prohibits tax-forgiveness schemes that discriminate against taxpayers who promptly paid their tax assessments in full. Respondents' efforts to distinguish those cases miss the mark.

Respondents attempt (at 7-8) to dismiss *Armco Steel Corp.* v. *Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), on the ground that the initial tax assessment in *Armco* was subsequently invalidated, whereas the initial Barrett Law assessment mechanism was subsequently abandoned by the City. Along the same lines, respondents argue (at 8-9) that three other decisions that conflict with the decision below—*State ex rel. Stephan* v. *Parrish*, 891 P.2d 445 (Kan. 1995), *Perk* v. *City of Euclid*, 244 N.E.2d 475 (Ohio 1969), and *Richey* v. *Wells*, 166 So. 817 (Fla. 1936)—are distinguishable because they involved government decisions to forgive the debts of delinquent taxpayers, whereas Resolution 101 erased the debts of taxpayers who elected to defer full payment of their Barrett Law assessments.

Those are not even distinctions—much less distinctions with a difference. The action challenged here is not the City's decision to impose the initial assessment pursuant to the Barrett Law. Nor is it

the City's decision to abandon the Barrett Law or the City's decision to forgive the debts of those who delayed full payment of their tax assessments. The action challenged here is respondents' separate decision to *withhold* relief from petitioners simply because they had already paid their tax bills in full. And that was precisely the government action at issue—and rejected as unconstitutional—in *Armco*, *Parrish*, *Perk*, and *Richey*.

For example, the holding of the Supreme Court of Michigan in *Armco* did not turn on whether the State had properly imposed the underlying assessment. Rather, *Armco* simply held that, once the State decided to forgive some tax debts, it could not then withhold that same relief from identically situated taxpayers who had paid in full: "[I]t [is] unconstitutional to benefit or prefer those who do not pay their taxes promptly over those who do." *Armco*, 358 N.W.2d at 844. That same reasoning applies with equal force in this case, and the fact that the initial Barrett Law assessments were lawful—respondents' purported distinction—is beside the point.

Respondents nevertheless try to distinguish *Armco*, *Parrish*, *Perk*, and *Richey* because those cases dealt with "patent unfairness." Br. in Opp. 9. That argument suffers from the same fatal flaw: The "unfairness" in question is the unfairness of withholding relief from petitioners simply because they promptly paid their taxes in full. Petitioners and those who elected to pay their assessments in installments both received the same benefit—sewer hookups. As respondents concede (at 3), however, petitioners paid $9278 each for that benefit while most of the other homeowners paid just $309. It is difficult to

imagine anything less "fair" than the imposition of a thirty-fold penalty on petitioners solely because they chose to pay their taxes when assessed.

Respondents further assert that the decision below does not conflict with *Armco* because in that case "no party ever put forth a rational basis for differential treatment." Br. in Opp. 7. But that just begs the question. In *Armco*, the Supreme Court of Michigan unequivocally held that the Equal Protection Clause precludes discrimination between two groups of taxpayers when "[t]he only distinction existing between them is that one group paid their deficiencies while the other group did not." *Armco*, 358 N.W.2d at 844. The Indiana Supreme Court took a fundamentally different view of the Equal Protection Clause. It therefore came to the opposite conclusion: that the Clause allows discrimination against taxpayers who promptly paid their taxes in full. In so holding, the court below also disagreed with *Parrish* and *Richey*, stating that it did "not find these decisions * * * persuasive and decline[d] to follow them." Pet. App. 33a. But a *disagreement* is not a *distinction* and therefore does nothing to diminish the square conflict with *Armco*, *Parrish*, *Perk*, and *Richey*.

In light of the Indiana Supreme Court's acknowledgment that its decision created a conflict with decisions of other state supreme courts, respondents' arguments to the contrary are unpersuasive. Any remaining doubt on that score, however, should be put to rest by the decision of the U.S. District Court for the Southern District of Indiana in *Cox* v. *City of Indianapolis*, 2010 WL 2484620 (June 14, 2010).

In *Cox*, the district court explained that "there are at least three state supreme court cases *directly* on

point," *id.* at *4 (emphasis added and quotation marks omitted)—including *Armco*, which the court characterized as "the most relevant" of those conflicting decisions, *ibid.* The court below rejected those opinions as unpersuasive, but the district court in *Cox* concluded that *Armco* and the decisions of the other state supreme courts were correct. Applying the rule from those cases, the district court held that the City violated the Equal Protection Clause by withholding refunds from homeowners who had paid their Barrett Assessments in full. The *Cox* decision thus confirms that the decision from the Indiana Supreme Court creates a case-dispositive conflict on the meaning of the Equal Protection Clause.

Respondents suggest (at 10) that no certworthy conflict will exist until the Seventh Circuit weighs in on *Cox*. Not so. In downplaying *Cox*, respondents overlook the conflict that the Indiana Supreme Court has *already* created. When the Seventh Circuit decides the *Cox* appeal, it will either agree with the Indiana Supreme Court and reverse, or agree with the Supreme Court of Michigan and affirm. It will therefore merely add one more voice to the preexisting conflict. A conflict will neither come into existence, nor cease to exist, when the Seventh Circuit rules. The time to grant certiorari to resolve that conflict is now.

II. Respondents Concede That The Constitutionally Deficient "Cost Savings" Rationale Is The *Sole* Justification For The City's Decision To Treat Similarly Situated Taxpayers Differently

The brief in opposition sows confusion about what government action is at issue. It spills considerable

ink justifying the City's abandonment of the Barrett Law and forgiveness of some tax assessments under that law. As explained above, however, those actions are not challenged. What is challenged is respondents' separate decision to withhold relief from petitioners simply because they had already paid their assessments. And respondents admit that they offer only one justification for that decision: cost savings.

Although respondents contend (at 12) that the City had various goals in mind when it abandoned the Barrett Law system, they acknowledge that "[petitioners'] solution of additional refunds would accomplish *the same goals*, but would have cost the city millions of additional dollars as a result," *id.* at 11 (emphasis added). And the City acknowledges that "[p]etitioners are correct that *all* of the City's *other* reasons for forgiveness without refunds *would have been accomplished* if refunds were also extended." *Id.* at 6 (emphasis added). This case therefore squarely presents the question whether the City's desire to protect its coffers constitutes a rational basis for its decision to discriminate against taxpayers who promptly paid their assessments in full. It does not.

Respondents first try to avoid the question altogether by suggesting that there exists no conflict "with any case" on the question whether cost savings alone qualifies as a rational basis for disparate treatment of similarly situated taxpayers. Br. in Opp. 11. But *Armco* is precisely such a case. In *Armco*, the State refused to provide refunds to taxpayers who had paid their deficiencies because the State was "[f]aced with a potential loss to the state treasury of up to $35 million in taxpayer refund

actions." *Armco*, 358 N.W.2d at 841. That justification was rejected in *Armco*; it should fail here too.

Attempting to sidestep the significant and recurring question presented by this case, respondents also assert that their cost-savings justification is "fact specific" and somehow "unique" to this case. Br. in Opp. 11. To the contrary, the cost-savings rationale offered by respondents will—if accepted—apply in *every* case in which a state or municipal taxation authority imposes a discriminatory tax-forgiveness scheme. After all, it will always be cheaper for the government to withhold relief from some similarly situated taxpayers.[1] There is little reason to think that governments will refrain from such discriminatory taxation schemes in the wake of the Indiana Supreme Court's opinion—and every reason to think just the opposite.

Indeed, respondents' argument lacks any limiting principle. If an interest in saving money constitutes a sufficient basis for discriminatory tax treatment, then every such tax would pass constitutional muster. Accepting that rationale would therefore provide authorities carte blanche to implement arbitrary—but lucrative—taxation schemes with no constitutional check.

Finally, respondents repeatedly protest that petitioners have no cause to complain because they benefited from sanitation improvements funded through Barrett Law assessments. Br. in Opp. 3, 9, 12. But

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[1] Indeed, *Armco* and the other state supreme court decisions cited above are proof that state and municipal taxation authorities often yield to the temptation to save money by denying relief to some taxpayers.

that argument just proves that petitioners are identically situated to the other homeowners who, after all, received the exact same benefit at 1/30th the cost. The mere fact that the City actually *spent* the money it obtained through an unconstitutional taxation scheme cannot justify the underlying constitutional violation. Spending unconstitutionally exacted money cannot undo a violation.

III. Respondents' Efforts To Reconcile The Decision Below With *Allegheny Pittsburgh* and *Nordlinger* Are Unavailing

The Indiana Supreme Court opined that this Court's unanimous decision in *Allegheny Pittsburgh* should be "narrowed to its facts." Pet. App. 28a. Respondents go even further, claiming that "the same differential treatment of new property owners" that was upheld in *Nordlinger* "was found unconstitutional in *Allegheny Pittsburgh*." Br. in Opp. 14.

Nothing could better prove the need for this Court's review than respondents' resort to the argument that a decision of this Court has been tacitly overruled. *Nordlinger* expressly rejected the argument that the circumstances there were "the same" as in *Allegheny Pittsburgh*. See 505 U.S. at 14-15; Pet. 23. Even if those cases are in tension and respondents are correct that the Indiana Supreme Court usefully elucidated ways in which *Nordlinger* limited *Allegheny Pittsburgh*, that is a reason to *grant* certiorari, not a reason to deny it. This Court alone possesses "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This case thus provides this Court with a golden opportunity to reconcile two lines of precedent that, if respondents

are correct, have caused confusion in the lower courts. (Of course, if petitioners are correct—and the governing precedent is *Allegheny Pittsburgh* and not *Nordlinger*—then certiorari should be granted to resolve the confusion and correct the error of the Indiana Supreme Court.)

Respondents suggest that *Allegheny Pittsburgh* is inapposite because "there has never been a finding that Indiana [s]tate law requires continued equity in Barrett Law taxation." Br. in Opp. 15-16. But that would surely come as news to the Indiana Supreme Court, which began its opinion by acknowledging that "[t]he costs of Barrett Law projects are generally 'apportioned equally among all abutting lands or lots' [benefited] by the improvement." Pet. App. 3a (quoting Ind. Code § 36-9-39-15(b)(3)). Thus, equality in taxation is, just as in *Allegheny Pittsburgh*, an express basis of the State's taxation scheme.

Respondents also claim that Indiana law generally provides that sewer assessments can be "'credited, eliminated, or reduced'." Br. in Opp. 16 (quoting Ind. Code § 36-9-39-17(c)). But their selective quotation of that statute conceals the fact that such relief is available only when a property "has already been assessed for sewage works" for an adjoining street or alley or a determination is made that the property cannot be connected to a project or would not fully benefit the property. Ind. Code § 36-9-39-17(a), (b). Thus, the prescribed relief is itself designed to achieve equality among taxpayers by ensuring that burdens correspond to benefits. What is more, the statute further provides that the "amount credited, eliminated, or reduced shall be primarily apportioned over *all the other property assessable for the sewage*

works." Id. § 36-9-39-17(c) (emphasis added). In other words, even the additional costs of fine-tuning initial assessments must be spread evenly across "all" other property owners.[2]

As for *Nordlinger*, respondents embrace the result but completely ignore its reasoning. The Court there upheld California's taxation scheme precisely because the affected taxpayers purchased their property in full knowledge of how the State's taxation scheme would operate. Accordingly, they lacked "legitimate expectation and reliance interests" that are the hallmark of the Equal Protection Clause. 505 U.S. at 13. It is self-evident that petitioners legitimately expected that they were not risking the unnecessary expenditure of thousands of dollars by paying their taxes in full; indeed, as explained in the petition (at 27) if the decision below stands few taxpayers will pay in full if given another reasonable payment option. Respondents offer only a question-begging footnote claiming that respondents could legitimately expect only equality in the initial assessment. Br. in Opp. 16 n.2. The fact that petitioners (and thousands of other Indiana citizens taxed for other Barrett Law projects) paid in full proves otherwise.

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[2] Respondents also observe that "long-term financing," which is authorized by state law, "will create inherent inequalities." Br. in Opp. 16. But such minor "inequalities" are expressly tolerated under the Equal Protection Clause—only "rough equality in tax treatment of similarly situated property owners" is required. *Allegheny Pittsburgh*, 488 U.S. at 343. That does not even begin to suggest that the thirty-to-one disparity at issue here passes constitutional muster.

IV. The Question Whether A Refund Is The Proper Remedy For Respondents' Equal Protection Violations Does Not Diminish The Need For This Court's Review

Respondents' final argument—that, if successful on the merits of their equal protection challenge, petitioners should not be entitled to a refund—need not long detain this Court. Respondents again ignore *Allegheny Pittsburgh*, which held that "'[t]he Equal Protection Clause is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.'" 488 U.S. at 346 (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)).

Petitioners' selective quotation of *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984), is not to the contrary. The Court there *reaffirmed* that "ordinarily 'extension [of the unconstitutionally withheld benefit], rather than nullification, is the proper course.'" *Ibid.* Moreover, *Mathews* involved a legislative declaration that a provision should be severed if later declared invalid. That is qualitatively different from *post hoc* affidavits (submitted in *another case*, no less) asserting that lawmakers "would not have approved forgiveness if they knew refunds were also required." Br. in Opp. 17. Statements of regret do nothing to remedy this equal protection violation—indeed, respondents do not claim that they will eliminate the discriminatory forgiveness decision. That is why the Indiana Court of Appeals had no difficulty concluding that refunds were the proper remedy. See Pet. App. 76a-77a.

Even if respondents were right that refunds are not required, *Mathews* rejected the assertion that such remedial limitations are a barrier to review: "[W]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." 465 U.S. at 739. And the lack of a refund would only underscore the need for review in this case—future litigants might be discouraged from challenging such patently unconstitutional schemes if authorities could so easily withhold monetary relief. This case is thus a prime opportunity to resolve this important constitutional question once and for all.

CONCLUSION

For the foregoing reasons and those stated in the petition and amicus briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 25, 2011

AMICUS CURIAE BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *ET AL.*,

Petitioners.

v.

CITY OF INDIANAPOLIS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

BRIEF OF NATIONAL TAXPAYERS UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Taxpayers Union ("NTU") is a nonprofit, nonpartisan membership organization founded by concerned taxpayers in 1969.[1] NTU's mission is to protect the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax, spending, regulatory, and economic issues. NTU represents over 362,000 members in all fifty states, and it has frequently participated in matters in this Court. *See Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989); *see also, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *DIRECTV, Inc. v. Levin*, No. 10-1322 (petition for certiorari pending).

A fundamental purpose of NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles in attempting to vindicate their legal and constitutional rights. NTU has litigated against efforts by state and local officials to erode restraints on their taxing authority, including both those imposed by citizens through ballot measures and the constitutional

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for amicus timely notified counsel for the parties under Supreme Court Rule 37. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

limitations imposed by the Equal Protection Clause. Based on NTU's experience in the area of taxation, it believes that this Court's review is warranted to correct the Indiana Supreme Court's erroneous decision to permit a local taxing authority to withhold tax refunds from those who paid their tax assessments in full, even as it forgave the tax obligations of otherwise identically situated taxpayers who chose to pay in installments.

SUMMARY OF ARGUMENT

The decision of the court below is irreconcilable with *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), which reaffirmed that the Equal Protection Clause "'protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" *Id.* at 639 (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). The Constitution requires "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," and disparate tax burdens must be "reasonable" and related to a legitimate government interest. *Id.* at 638. Here, the City of Indianapolis imposed enormously unequal tax burdens on taxpayers who are identically situated in every way but one: The City forgave the outstanding tax liability of taxpayers who paid in installments, while refusing to refund any taxes paid by those who had already paid in full. Such irrational and discriminatory treatment is not reasonably related to any legitimate government interest that the City has articulated, and cannot be squared with *Allegheny Pittsburgh*. The erroneous, contrary decision of the court below has important legal and practical

ramifications that warrant this Court's immediate review.

Specifically, this case presents a significant legal question regarding the interplay between *Allegheny Pittsburgh* and *Nordlinger v. Hahn*, 505 U.S. 1 (1992). Contrary to this Court's own explanation in *Nordlinger*, the court below limited *Allegheny Pittsburgh* to its precise facts. By contrast, other courts have continued to treat *Allegheny Pittsburgh* as good law, and several, in particular, have held that unequal tax policies similar to the one at issue here violate the Equal Protection Clause. This Court's intervention is needed to correct the Indiana Supreme Court's view that *Allegheny Pittsburgh* provides no meaningful constitutional limit on tax decisions.

A proper understanding of *Allegheny Pittsburgh* and *Nordlinger* would apply broadly to tax decisions across the country, and in particular to the tax consequences of the large number of instances where taxpayers have the option of paying immediately or in installments over time. Tax decisionmakers and courts need a clear rule on how to apply the Equal Protection Clause to unequal taxation in these situations.

Finally, there is no rational basis for forgiving the tax obligations of those who had chosen to pay in installments and withholding a refund from those had already paid in full. The court below relied on the supposition that those who paid in full were in a better financial position than those who paid in installments, but there is no evidence to support this speculation, or even to show that the City considered

this possibility when implementing its discriminatory tax arrangement. Moreover, this purpose would conflict with Indiana law, just as a purpose of tax inequality conflicted with state law in *Allegheny Pittsburgh*. This Court should grant certiorari to reverse the court below and reaffirm the validity of *Allegheny Pittsburgh*'s requirement of a real, rational basis for unequal taxation. NTU believes the proper remedy is for all affected taxpayers to receive refunds of past payments and forgiveness of future payments, regardless of whether their overpayment was made in a single lump sum or installments.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT LEGAL ISSUES THAT AFFECT TAXPAYERS ACROSS THE COUNTRY.

A. This Court should correct the erroneous, outlier interpretation of *Allegheny Pittsburgh* adopted by the court below.

This case presents a fundamental dispute over the interpretation of two of this Court's cases: *Allegheny Pittsburgh* and *Nordlinger*. The court below concluded that *Nordlinger* limited this Court's unanimous decision in *Allegheny Pittsburgh* to its precise facts, making the latter essentially worthless as precedent. This approach—which conflicts with this Court's own explanation of its decisions in *Nordlinger*—is incorrect. This Court should make clear that *Allegheny Pittsburgh* remains good law, and that irrational tax decisions remain unconstitutional.

In *Allegheny Pittsburgh*, this Court held that a county's practice that "resulted in gross disparities in

the assessed value of generally comparable property," and thus in the tax on comparable property, violated the Equal Protection Clause. *Id.* at 338. The county tax assessor decided to value property based on its purchase price, while making only minor modifications in the assessments of land that had not been sold recently. *See id.* As a result, the petitioner "was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties." *Id.* at 341. This Court recognized that a "State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," but held that "West Virginia has not drawn such a distinction." *Id.* at 344-45. Indeed, West Virginia's differential tax burden contravened the state's constitution, which "provide[d] that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." *Id.* at 345.

Three Terms later, in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), this Court denied an equal protection claim challenging an amendment to the California Constitution whereby "[r]eal property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market." *Id.* at 5.[2] The effect of this "acquisition value" system of taxation was that "longer term property owners pay lower property taxes reflecting historic property

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[2] NTU actively supported enactment of the California constitutional amendment (Article XIIIA) at issue in *Nordlinger*.

values, while newer owners pay higher property taxes reflecting more recent values." *Id.* at 6. This Court held that "[t]he appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest." *Id.* at 11. This standard means that "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (internal citations omitted). The Court held that there were "at least two rational or reasonable considerations" justifying the differential treatment: (1) "the State has a legitimate interest in local neighborhood preservation, continuity, and stability"; and (2) "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12.

This Court explained that the "obvious and critical factual difference between [*Nordlinger*] and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme." *Id.* at 14-15. In short, rational basis review "require[s] that a purpose may conceivably or may reasonably have been the purpose and policy of the

relevant governmental decisionmaker"; and, in *Allegheny Pittsburgh*, "the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Id.* at 16 (internal quotation marks omitted); *see also Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 109-110 (2003) (reiterating this basis for reconciling *Nordlinger* with *Allegheny Pittsburgh*).

Instead of accepting this Court's own explanation of why *Allegheny Pittsburgh* remained good law after *Nordlinger*, the court below discarded *Allegheny Pittsburgh*. It provided three grounds for doing so, none of which withstands scrutiny.

First, the court below held that "*Allegheny Pittsburgh* has essentially been narrowed to its facts." *City of Indianapolis v. Armour*, 946 N.E.2d 553, 568 (Ind. 2011). However, nothing in *Nordlinger* or any other decision by this Court suggests that *Allegheny Pittsburgh* should be read so narrowly. Indeed, *Nordlinger* accepted the principles of *Allegheny Pittsburgh*, and held simply that a rational basis was present in one case but not in the other.

Second, the court below reasoned that *Allegheny Pittsburgh* was inapposite because it was purportedly "a class-of-one case—a tax policy directed at a particular taxpayer." *Id.* The court cited no language in *Allegheny Pittsburgh* or *Nordlinger* supporting the idea that *Allegheny Pittsburgh* applies only to a "class-of-one" case. In any event, as this Court has explained, the designation as a "class-of-one" case "is of no consequence because . . . the number of individuals in a class is immaterial for equal

protection analysis." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (per curiam). Likewise, the suggestion by the court below that "animus or ill-will toward the plaintiffs" is a *de facto* requirement for a class-of-one equal protection violation, *see City of Indianapolis*, 946 N.E.2d at 565, has no basis in precedent. Indeed. if *Allegheny Pittsburgh* were a class-of-one case, it would belie any such suggestion, because no such finding of animus existed there.

Third, the court below observed that *Allegheny Pittsburgh* "has been criticized by at least one Justice on the Supreme Court and by scholars." *City of Indianapolis*, 946 N.E.2d at 568 (citing *Nordlinger*, 505 U.S. at 18-28 (Thomas, J., concurring in part and concurring in the judgment); William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87, 104 (1990); Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 263 (1990)). Of course, a concurring opinion and a few law review articles provide no basis for a lower court to discard this Court's precedents.

In contrast to the court below, other courts continue to apply the principles underlying *Allegheny Pittsburgh* beyond the particular facts in that case. The most obvious example is the Indiana district court that held unconstitutional the very same tax at issue in this case. *See Cox v. City of Indianapolis*, No. 1:09–cv–435–WTL–DML, 2010 WL 2484620, at *3-*4 (S.D. Ind. June 14, 2010). Likewise, several other courts have held that differential refunds based on whether a tax payment was made in full violate the Equal Protection Clause. *See, e.g., State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995);

Armco Steel Corp. v. Dep't of Treasury, 358 N.W.2d 839 (Mich. 1984); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); *Richey v. Wells*, 166 So. 817, 819 (Fla. 1936).

More generally, outside this particular context, courts have held that *Allegheny Pittsburgh* has broad applicability. For example, the Ninth Circuit has recognized that the key difference between *Allegheny Pittsburgh* and *Nordlinger* is that in the former, the policy "violated a statutory command," and in the latter, the policy "was required by state law." *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1197-98 (9th Cir. 2002). The Ninth Circuit held that this distinction results in a different standard for rational basis review: "*Allegheny Pittsburgh* does not tell us precisely what standard of rationality is required under equal protection to justify a systematic difference in treatment when that difference violates a statutory command, but it is at least clear that the standard is substantially less forgiving than when the difference in treatment is statutorily required." *Id.* at 1198.

In sum, the Indiana Supreme Court has created a significant conflict over the proper interpretation of *Allegheny Pittsburgh* in light of *Nordlinger*. This Court's guidance is needed to correct the view of the court below and to reaffirm that government officials may not make discriminatory tax decisions without any legitimate purpose.

B. The issues in this case are important and will affect tax decisions across the country.

There is enormous variation in tax policies across the country, and the equal protection issues at stake here are crucial in evaluating those policies.

Tax officials—and courts reviewing their decisions—need to know that there must be a legitimate basis for tax decisions, particularly those that differentiate among similarly situated taxpayers. The court below reasoned that administrative convenience and preservation of resources are legitimate bases for a 30-to-1 difference in taxing otherwise similar households. Moreover, it held that an unsupported supposition of different income levels could support different taxes, even absent any evidence of such differential income, and in the face of state law to the contrary. *See infra* Part II. In short, according to the decision below, *Allegheny Pittsburgh* provides virtually no limit on tax decisions. This Court's intervention is necessary to correct these errors and to provide needed guidance on the proper interpretation of *Allegheny Pittsburgh*.

Furthermore, the particular situation here is likely to recur frequently. There are many situations in which a taxpayer has the option to pay in installments or in a lump sum. *See, e.g.*, S.C. Code § 12-45-75 ("The governing body of a county may by ordinance allow each taxpayer owning a parcel of taxable real property within the county the option to pay property taxes in installments . . . ."); Ky. Rev. Stat. § 141.305 ("Installment payments of estimated tax."); St. Louis County Revenue, Property Tax Installment Payment Program, *available at*

http://revenue.stlouisco.com/collection/PropertyTaxInstallmentPaymentProgram.pdf ("To be eligible for the prepayment installment program, . . . [t]he total tax billed amount, based on last year's taxes, must be a minimum of $100 . . . ."); Lee County, Fla., Installment Payment Plan, *available at* http://www.leetc.com/taxes.asp?page_id=txinstallplan ("Property taxes can be paid by the installment method if the prior year's real estate or tangible tax bill is more than $100."). In these circumstances, any time there is a refund, there is a possibility of disfavoring the taxpayers who paid up front. Indeed, government officials in many states discriminated against such taxpayers until (as discussed above) state supreme courts generally held that differential refunds cannot be based on whether the tax payment was made in full. The Indiana Supreme Court's decision now calls that principle into doubt.

Finally, the issue is not only potentially widespread, but plainly of great significance to the people involved—all of whom chose to pay their taxes fully, and without meeting any income criteria for doing so. In short, this case involves not only a significant legal issue, but equally significant practical consequences for taxpayers throughout the country.

II. THE COURT BELOW ERRED IN UPHOLDING THE PLAINLY IRRATIONAL TAX IN THIS CASE.

The court below erred in upholding tax forgiveness for taxpayers who had chosen to pay over time but not a refund for identically situated taxpayers who had chosen to pay in full. Under the

correct reading of *Allegheny Pittsburgh*, an unequal tax practice requires a rational basis that "may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15-16 (internal quotation marks omitted). In addition, a court will not infer that a decisionmaker had a permissible purpose if such action conflicts with state law. *See Allegheny Pittsburgh*, 488 U.S. at 345.

Here, there is no rational basis that was conceivably the actual purpose of the unequal taxation imposed by the City. In upholding the unequal taxation, the Indiana Supreme Court cited "preservation of limited resources" and "administrative convenience," *City of Indianapolis*, 946 N.E.2d at 560, 563, as legitimate government interests—but neither of these bases is remotely plausible. The preservation of resources might explain (though, in NTU's opinion, not necessarily justify on policy grounds) the total amount of reduced taxes, but not the inequality, *i.e.*, the choice to draw the line between those who paid fully and those who did not. Administrative convenience is even more nonsensical because the refund to those who paid in full would involve only basic arithmetic.

The only other explanation offered by the court below is that "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." *Id.* at 562. But there is no evidence that taxpayers who paid fully were in better financial positions, or that the City actually considered this possibility prior to litigation. *See id.* at 572 (Rucker, J., dissenting). The court

below held that the City need not "come forth with proof that all the property owners who had their assessments discharged were actually middle- or low-income" individuals. *Id.* at 562. However, as *Nordlinger* explained, "the Equal Protection Clause is satisfied so long as . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Nordlinger*, 505 U.S. at 11. In other words, for purposes of the rational basis test, courts must accept the government's explanation only if the government actually considered some facts in the first place. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("*Where there was evidence* before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.") (emphasis added).

Here, the City did not provide evidence regarding *any* of the taxpayers who delayed payment or those who paid in full. *See Cox*, 2010 WL 2484620, at *4 ("There is absolutely nothing in the record indicating that the Plaintiffs are not lower to middle income property owners. As such, this argument does not present a plausible reason for the disparate treatment within the class.") (internal quotation marks omitted). Accordingly, there is nothing to show that this purpose was reasonably or conceivably the City's purpose.

In any event, as in *Allegheny Pittsburgh*, the rationale offered by the City in litigation is contrary to state law. The tax was imposed pursuant to Indiana's Barrett Law, which required taxes to be

"apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15. The City simply reduced the taxes imposed under this law. However, this reduction was given only to the taxpayers who had chosen to pay by installment. As a result, the taxes were not apportioned equally, as required by law. Indeed, even the new tax scheme that replaced the Barrett Law system—and provided the reason for the tax reduction—does not purport to take income or "financial position" into account in the amount of taxation. *City of Indianapolis*, 946 N.E.2d at 557 n.5. Rather, it mandates a flat $2,500 fee (along with a monthly sewer bill) for all property owners adjacent to new sewer construction projects. *Id.* Thus, the supposed purpose of taxing based on financial position was contrary to state law, just as a purpose of unequal taxation in *Allegheny Pittsburgh* was contrary to state law mandating uniform rates. 488 U.S. at 345. This supposed reason for unequal taxation is not a "conceivable purpose" because it contravenes state law.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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September 8, 2011

AMICUS CURIAE BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Indiana Supreme Court

BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a city government violate the Equal Protection Clause when it forgives outstanding payments owed by taxpayers who have been paying a particular tax in installments but refuses to refund taxpayers who have paid the same tax in full?

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INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioners in the above-captioned matter. [1]

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for Petitioners and Respondents were timely notified of *amicus curiae*'s intent to file and their written consent have been obtained and filed with the Clerk of the Court.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more understandable and accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

This Court's decision will provide guidance on the line between states' power to shape their tax systems and discriminatory taxation forbidden by the Commerce Clause. Because this Court's decision may be looked to as authority by other courts analyzing whether specific state tax practices violate the Commerce Clause, the Tax Foundation has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

The divided decision of the court below sustained an arbitrary tax policy that is problematic both for constitutional practical ones reasons. Unless reversed, taxpayers across the United States will have less certainty with which to make effective financial decisions. This Court should take the opportunity to forestall future otherwise-inevitable disputes on the basic standard of equal treatment of similarly situated taxpayers and provide guidance to government officials on constitutional refund procedures. By doing so, this Court will promote an

efficient and beneficial legal climate for individual and business taxpayers alike.

ARGUMENT

I. THIS COURT SHOULD TAKE THE OPPORTUNITY TO RESTRICT ARBITRARY AND IRRATIONAL STATE REFUND PRACTICES.

A. The City's Actions in This Case are Arbitrary and Irrational.

The conflict in this case arose when the Indianapolis city government changed its sewer tax, under which taxpayers had to pay $9,000 either (1) in full or (2) in installments. The 2005 change reduced the tax going forward and forgave the outstanding payments of all taxpayers who were paying the tax in installments. Taxpayers who had paid in full, including Petitioners, received no *pro rata* refund of any kind, and allege a violation of the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment does not require states to "maintain a precise, scientific uniformity with reference to composition, use, or value." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). State sovereignty allows state governments to impose various taxes at different rates on certain entities to raise revenue. *See id.* at 526-27. States, however, cannot treat taxpayers unequally *carte blanche*. *See, e.g., id.* at 527, *citing F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). ("The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that

the classification 'must upon some ground of difference having a fair and substantial relation to the object of the legislation.").

The City justifies its unequal refund policy by pointing to its interest in administrative convenience and relief for the poor, *see City of Indianapolis v. Armour*, 946 N.E.2d 553, 560 (Ind. 2011), notwithstanding the high cost associated with engaging in refund processing at all as well as the cost associated with dividing otherwise identical taxpayers into disparate groups. Further, the policy does not benefit poor taxpayers exclusively or even primarily; if poor taxpayers do benefit disproportionately, it is only by chance.

The decision of the court below failed to evaluate the City's stated justifications adequately. Rather than finding a rational link between (1) the social goal of providing the less fortunate with tax relief to (2) the act of denying refunds to certain taxpayers, the court below only merely discussed the legitimacy of helping the poor as a governmental interest and assumed that this justifies the City's policy of treating pay-in-full taxpayers disparately than pay-in-installments taxpayers. *See id.* at 562-63. The two dissenting judges in the decision below correctly noted that there was "nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments" and that "'[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners.'" *Id.* at 570-71 (Rucker, J., dissenting).

More distressingly, the decision of the court below fails to acknowledge any due process or equal

protection boundaries on governmental interests. In doing so, the court selectively cited this Court's precedents to suggest that the "rational basis" test is no limit on arbitrary governmental actions. *See, e.g., id.* at 561, *citing FCC. v. Beach Communications, Inc.*, 508 U.S. 307, 15 (1993) ("[I]t does not matter what the actual policy reason was, so long as a legitimate reason can be conceived."); *id.* at 561, *citing Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959) ("[A] policy reason is sufficiently plausible if it 'may reasonably have been the purpose and policy' of the relevant government decisionmaker."). This reasoning by the court below is disconcerting because it could conceivably uphold any governmental action justified by administrative cost concerns. The scope of discretion that the court below gave the City government signals that any violation of the Equal Protection Clause is permissible if the authorities claim there is a governmental interest.

Courts in other states have determined that selective tax treatment such as at issue in this case violates equal protection guarantees. *See, e.g., Gosnell Development Corp. v. Arizona Dep't of Revenue*, 744 P.2d 451, 453 (Ariz. Ct. App. 1987) ("Under well-settled Arizona and federal law, taxing authorities treating taxpayers in the same class differently, as Gosnell has been treated, violate their rights to equal protection under the law.)"; *Armco Steel Corp. v. Dep't of the Treasury*, 358 N.W.2d 839, 243 (Mich. 1984) (citing *Beauty Built Construction Co. v. City of Warren*, 134 N.W. 2d 214, 236 (Mich. 1965)) ("Where an ordinance fails to include and affect alike all persons of the same class, and extends

immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions."); *Washington Theatre Club, Inc., v. District of Columbia*, 311 A.2d 492, 495 (D.C. 1973) ("[I]f there is no substantial difference between the operation of these two organizations, [granting only one organization a tax exemption] would amount to an unfair denial of equal tax treatment to appellant."); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969) ("A statute which confers special benefits upon delinquent taxpayers not equally available to nondelinquent taxpayers violates Section 2 of Article I of the constitution of Ohio [promising equal protection to its citizens] and is therefore void and of no effect."). These cases conclude that arbitrary tax classifications resulting in unequal treatment violate constitutional protections. This Court should look to these cases as persuasive in interpreting the applicability of the Fourteenth Amendment to the City's action in this case.

B. If Allowed to Stand, the Decision of the Court Below Will Undermine Business Certainty, Tax Compliance, and Respect for the Law.

The Indiana Supreme Court's decision below has negative implications for not only the petitioners in the instant case, but also unforeseen numbers of other taxpayers. Individual taxpayers must use scarce resources and time educating themselves about applicable tax laws and complying, and business taxpayers face even greater compliance costs because tax laws, especially at the local level,

change often. This holds true especially for individuals and companies with a tax obligation in multiple states: they have many local, state, and federal tax laws to obey. When governments act arbitrarily in their tax procedures, these scarce resources must be allocated to cumbersome compliance procedures. Without the ability to make reasonable predictions about tax climates and resource allocation, making important business decisions becomes more difficult and reducing business activity.

While the taxpayers in the instant case were all individual taxpayers, the decision of the court below effectively encourages unpredictable and arbitrarily targeted tax policy. Taxpayers are effectively taught that they should pay their taxes in installments whenever possible because they may "lose" less money than those who pay in full. Moreover, taxpayers who can afford to pay in full have even greater incentive to pay in installments, a decision made not for economic freedom but due to an uncertain legal climate.

The decision below emphasized that tax authorities can use taxpayers' probable economic statuses as a justification for arbitrary tax policy, a dangerous precedent. State revenue officials already often claim that their constitutionally questionable actions are justified by budget concerns. If the decision of the court below stands, they will be encouraged to push the limits even further. *See, e.g.*, Paul Frankel, *Retroactivity and Retained Refunds*, TAX FOUNDATION TAX POLICY PODCAST (Jul. 7, 2010), http://www.taxfoundation.org/research/show/26493.h

tml (explaining government proclivities towards citing governmental interests in questionable ways).

The instant case is not an aberration in showing little regard for business certainty and scarce resources. In *Zoeller v. Aisin USA Manufacturing, Inc.*, 946 N.E.2d 1148 (Ind. 2011), the Indiana Supreme Court upheld outrageous state tax refund policy. In that case, the Indiana Department of Revenue sent a taxpayer an overpayment but later determined that their issuance of the refund was a clerical error. The Department proceeded to send out a series of notifications that cancelled the assessment, re-issued it, and altered the amount due, all after the statute of limitations had already passed. The Indiana Supreme Court determined that the Department of Revenue had been acting within the statute of limitations because the case did not technically concern taxation but instead refunds. Decisions such as *Zoeller* and the instant case suggest that some state officials are concerned neither with protecting taxpayers' rights nor with encouraging taxpayers to engage in productive economic activities. This in turn makes it less likely that taxpayers will feel that they are represented faithfully by their government.

For many citizens, paying taxes is one of the few ways that they interact with the government. Tax policy widely perceived as unusual and unfair threatens to foster a general disenchantment with the government, creating tensions between the law and citizens. By reiterating basic standards of equal refund treatment of a canceled tax, this Court will reduce the prevalence of a rising problem of arbitrary taxation practices.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Tax Foundation respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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September 8, 2011

JOINT APPENDIX

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v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED – Aug. 8, 2011
PETITION FOR A WRIT OF CERTIORARI GRANTED – Nov. 14, 2011

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MARION SUPERIOR COURT

Cause No. 49D110706CT026050

CHRISTINE ARMOUR,
Plaintiff,

vs.

CITY OF INDIANAPOLIS,
Defendant.

RELEVANT DOCKET ENTRIES

Date	Event Description
06/22/07	CASE FILED.
03/11/08	MOTION FOR SUMMARY JUDGMENT FILED. BY PLAINTIFF.
03/11/08	PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND DESIGNATION OF EVIDENCE.
3/11/08	AFFIDAVIT OF INGEBORG HAESLOOP
05/29/08	MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT, AND DESIGNATION OF EVIDENCE.
05/29/08	DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

07/09/09	PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT.
07/29/08	CAUSE SET FOR MTN FOR SUMMARY JUDGMENT ON 09/29/08 AT 10:00 OCLOCK A.M.
09/29/08	JACKET ENTRY: PARTIES BY COUNSEL; HEARING HELD ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED 3-11-08 ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED 5-29-08; MATTER TAKEN UNDER ADVISMENT.
10/09/08	COURT DENIES DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED ON 5-29-08.
10/09/08	COURT APPROVES ORDER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT 3-11-08.
10/09/08	JACKET ENTRY: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DENIED; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ENTERED.

12/04/08	COURT APPROVES ORDER GRANTING GENERAL JUDG[MENT]. $4,329.73 PLUS COST AND INTEREST JUDGMENT GRANTED 12-04-08. SEE FILE
12/04/08	JACKET ENTRY: JUDGMENT ENTRY IN FAVOR OF PLAINTIFF'S APPROVED AND ORDERED; SEE ENTRY THIS DATE.
12/04/08	CAUSE DISPOSED BY BENCH TRIAL.
01/02/09	NOTICE OF APPEAL FILED. 12/31/08 BY DEFENDANTS BY COUNSEL.
07/16/09	TRANSCRIPT SENT TO THE COURT OF APPEALS ON 7/15/09.

COURT OF APPEALS OF INDIANA

No. 49 A 02–0901–CV–00084

CITY OF INDIANAPOLIS, ET AL.,
Appellants-Defendants,

v.

CHRISTINE ARMOUR, et al.,
Appellees-Plaintiffs.

RELEVANT DOCKET ENTRIES

DATE	TEXT
12/31/08	"NOTICE OF APPEAL FILED"
01/23/09	NOTICE OF COMPLETION OF TRANSCRIPT (1)
01/29/09	NOTICE OF COMPLETION OF CLERK'S RECORD (1)
03/02/09	APPELLANTS' BRIEF (9) AND TWO (2) VOLUME APPENDIX FILED
04/06/09	APPELLEES' BRIEF (9) AND ONE (1) VOLUME APPENDIX FILED
06/15/09	REPLY BRIEF (9)
07/08/09	TRIAL COURT CLERK NOTIFIED TO TRANSMIT TRANSCRIPT.

07/15/09	RECEIVED: ONE (1) VOLUME TRANSCRIPT FROM TRIAL COURT CLERK.
07/24/09	ISSUED THE ENCLOSED ORDER:
07/24/09	COMES NOW THE COURT, AND SCHEDULES THIS CASE FOR ORAL ARGUMENT FOR THE FOLLOWING TIME AND PLACE: 2:00 P.M., INDIANAPOLIS TIME WEDNESDAY, AUGUST 19, 2009. * * *
09/08/09	ISSUED THE ENCLOSED ORDER:
09/08/09	HAVING REVIEWED THE MATTER, THE COURT FINDS AND ORDERS AS FOLLOWS: WITHIN TEN (10) DAYS OF THE DATE OF THIS ORDER, THE APPELLANT IS ORDERED TO FILE WITH THE CLERK OF THIS COURT A SUPPLEMENTAL APPENDIX THAT INCLUDES: 1. AN UP-TO-DATE AND CERTIFIED COPY OF THE CHRONOLOGICAL CASE SUMMARY, AND, 2. A COPY OF THE ANSWER TO THE APPELLEES-PLAINTIFFS' COMPLAINT. FOR THE COURT, JOHN G. BAKER, CHIEF JUDGE
09/15/09	APPELLANT'S ONE (1) VOLUME SUPPLEMENTAL APPENDIX FILED.
12/18/09	ISSUED THE ENCLOSED OPINION:

12/18/09	2009 TERM AFFIRMED AND REMANDED------NAJAM, J. KIRSCH, J. AND BARNES, J. CONCUR 30 PAGES
01/19/10	APPELLANT'S PETITION FOR REHEARING
02/08/10	APPELLEE'S BRIEF IN RESPONSE TO REHEARING
02/17/10	APPELLANT'S PETITION FOR REHEARING DENIED. FOR THE COURT, JOHN G. BAKER, CHIEF JUDGE[.] ALL PANEL JUDGES CONCUR.
03/19/10	RECEIVED 03/19/10: BRIEF OF AMICI CURIAE THE INDIANA ASSOC. OF CITIES AND TOWNS AND THE INDIANA MUNICIPAL LAWYERS ASSOC. IN SUPPORT OF THE PETITION TO TRANSFER FILED BY THE CITY OF INDPLS.
03/19/10	APPELLANT'S PETITION FOR TRANSFER
03/25/10	ISSUED THE ENCLOSED ORDER:
03/25/10	BEING DULY ADVISED, THE COURT NOW GRANTS THE MOTION AND PERMITS INDIANA ASSOCIATION OF CITIES AND TOWNS TO APPEAR AS AMICUS CURIAE. THE CLERK IS DIRECTED TO SHOW THE

	TENDERED BRIEF OF AMICUS CURIAE AS BEING FILED AS OF THE DATE OF TENDER. BRENT E. DICKSON, ACTING CHIEF JUSTICE
04/12/10	APPELLEE'S BRIEF IN RESPONSE TO TRANSFER
04/26/10	APPELLANT'S REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER.
07/30/10	CASE TRANSFERRED TO THE SUPREME COURT
	SUPREME COURT CAUSE NUMBER 49S021007CV00402

SUPREME COURT OF INDIANA

No. 49 S 02 –1007–CV–00402

CITY OF INDIANAPOLIS, ET AL.,
Appellants (Defendants below),

v.

CHRISTINE ARMOUR, ET AL.,
Appellees (Plaintiffs below).

RELEVANT DOCKET ENTRIES

DATE	TEXT
07/30/10	APPELLANT'S PETITION FOR TRANSFER IS HEREBY GRANTED. RANDALL T. SHEPARD, CHIEF JUSTICE
09/10/10	ISSUED THE ENCLOSED ORDER:
09/10/10	THE COURT HAS DETERMINED THAT THE ABOVE-CAPTIONED CASE WARRANTS ORAL ARGUMENT. * * * THE ARGUMENT WILL TAKE PLACE AT THE FOLLOWING DATE AND TIME: THURSDAY, OCTOBER 28, 2010, AT 9:45 A.M. * * *
10/19/10	APPELLEES' NOTICE OF ADDITIONAL AUTHORITY

05/10/11 ISSUED THE ENCLOSED OPINION:

05/10/11 2011 TERM WE HOLD THAT RESOLUTION 101 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL INTERESTS. ACCORDINGLY, WE REVERSE THE DECISION OF THE TRIAL COURT AND REMAND WITH INSTRUCTIONS TO GRANT JUDGMENT FOR THE CITY ON THE PLAINTIFFS' FEDERAL EQUAL PROTECTION CLAIM. ---------- SULLIVAN, J. SHEPARD, C.J., AND DAVID, J., CONCUR. RUCKER, J., DISSENTS WITH SEPARATE OPINION IN WHICH DICKSON, J. CONCURS. 23 PAGES.

06/21/11 **********OPINION CERTIFIED**********

STATE OF INDIANA	)	IN THE MARION
	) SS:	COUNTY SUPERIOR
COUNTY OF	)	COURT
MARION	)	
		CAUSE NO. 49D11 07 06 CT 026050

CHRISTINE ARMOUR, DAVID A. BIRD, ALVERA C. BUKER, JOSEPH and ROZZETTA CUMBERLANDER, ALICE J. DETZLER (Dickson F. Detzler, deceased), JAMES and RENATE DONAHUE, KENNETH J. and MARY JANE EILER, SANDRA KAY HEVRON, Personal Representative of the Estate of Ruth Virginia Enmeier, DAVID A. and HEATHER R. FELLABAUM, NANCY LEE GAHL, DAVID M. GIBSON, Trustee of the Margaret Lockhart Gibson Trust, INGEBORG HAESLOOP, Executrix of the Estate of Robert E. Haesloop, ROBERT E. and JUNE E. HOLT, FRANK S. and JEANNE A. JOHNSON, EDWARD J. and ERIKA M. KELLY, LEONARD and COLLEEN E. KIRKSEY, CARLOS O. and KATRINA V. KREAMER, FRANK P., JR. and BETTYE JO LLOYD, WILLIAM H., JR. and SUE ELLEN MAIN,	)	FILED 46 JUL 22 2007 *Elizabeth L. White* CLERK OF THE MARION CIRCUIT COURT

WILMA M. MARLEY, GEOFFREY H. and DINAH J. MICHELS, NORMA JEAN MORGAN, ZORA NATHAN (Harry Nathan, deceased), FRANK D. and SHARON L. NEESE, DONNIS D. PATTON, VIESTURS M. and CAROLYN PURVLICIS, SUSAN MOE, Co-Executrix of the Estate of Margaret Rosemary Richard, M. EVELYN ROGERS, MRS. CLIFFORD A. SHORT, LOUIS J., JR. and LINDA J. URBANCIC and MARY B. WILLIAMS.

Plaintiffs.

vs.

CITY OF INDIANAPOLIS, BART PETERSON, Mayor of the City of Indianapolis, INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, INDIANAPOLIS BOARD OF PUBLIC WORKS, ROBERT J. CLIFFORD, Controller of the City of Indianapolis, INDIANAPOLIS OFFICE OF FINANCE AND MANAGEMENT and BILLIE J. BREAUX, Marion County Auditor,

Defendants.

COMPLAINT FOR BARRETT LAW ASSESSMENT REFUND, DECLARATORY RELIEF, OR IN THE ALTERNATIVE, ORDER OF MANDAMUS

PARTIES

1. Plaintiffs, at all times relevant herein, are each real estate owners in the Northern Estates Neighborhood Association ("Northern Estates"), who have applied for a Barrett Law assessment refund with the Marion County Auditor. A chart containing the names of each Plaintiff (in some cases co-tenants or tenants by the entireties are listed as one Plaintiff), their respective addresses, date of payment of the assessment, the amount paid, and the amount of the excess payment is attached hereto and incorporated herein as Exhibit 1.

2. The City of Indianapolis is a Class 1 municipal corporation established under the laws of Indiana, and Bart Peterson has for all times relevant herein served as Mayor of the City of Indianapolis.

3. The Indianapolis Department of Public Works (DPW) is responsible for the construction, operation, and maintenance of the sanitary sewers within the City of Indianapolis.

4. Prior to January 1, 2006 the City of Indianapolis financed new sanitary sewers pursuant to Barrett Law Assessments. The Indianapolis Board of Public Works was authorized by Indiana Code (I.C.) § 36-9-39 and I.C. § 36-9-37 to administer the Barrett Law Funding for Municipal Sewer program under which the Board approved all Barrett Law projects within the City of Indianapolis-Marion County, and it was the responsibility of the Office of

Finance and Management to collect those assessments.

5. Barrett Law Assessments, including the Barrett Law Assessments paid by Plaintiffs herein, were paid to the Controller of the City of Indianapolis, Barrett Law Division. The current Controller of the City of Indianapolis is Robert J. Clifford.

6. Billie J. Breaux is the Marion County Auditor and as such, has responsibility for, *inter alia*, processing requests for refunds of any excess payment of a Barrett Law Assessment.

FACTS

7. In July 2004, the DPW, pursuant to Indiana Code §§ 36-9-37-1, *et seq.* and 36-9-39-1 *et seq.*, levied a Barrett Law assessment of $9,278.00 on all of the real estate located within the Phase I boundary of Northern Estates that included the Plaintiffs' real estate, with the exception of Alvera Buker whose total assessment, because of circumstances unique to her, was $4,639.00. Maps showing this Phase I boundary are attached hereto and incorporated herein as Exhibit 2. The real estate properties subject to the Phase I assessment are located in either Marion County Tax District 600 or District 800.

8. This assessment was for the installation of a sanitary sewer abutting each property. The City has referred to this assessment as the "Phase I, Brisbane/Manning Barrett Law Assessment" ("Assessment"), and the one hundred eighty-five properties subject to this Assessment were all located within the area of the new sewer line for

which the "Assessment" was levied ("the Phase I Tax District").

9. The levy of this Barrett Law Assessment by the DPW was an exercise of its powers of taxation and such assessment was a tax upon each owner's real property within the Phase I Tax District.

10. Under the Barrett Law, a property owner may either pay the total assessment promptly or elect to pay the assessment in installments. Plaintiffs all promptly paid their Barrett Law assessment in one lump sum. However, a majority of the property owners (149 owners) in the Phase I Tax District, including Sara Baker, elected to pay their assessment in ten or twenty year installments.

11. In October 2005, the DPW proposed and the Board of Public Works approved discontinuance of the use of the Barrett Law funding in Marion County, as regards new sanitary sewers, and replaced it with the Septic Tank Elimination Program ("STEP"). Under STEP, a homeowner would pay a flat $2,500.00 sewer connection fee to the County and a monthly sewer bill. The connection fee was to be paid in lump sum or, in special cases, over a five year period.

12. As a result of this change, the Marion County Board of Public Works, on December 7, 2005, adopted RESOLUTION NO. 101, 2005, A RESOLUTION FORGIVING BARRETT LAW ASSESSMENTS, which states:

> NOW, THEREFORE, BE IT RESOLVED that the Board of Public Works hereby forgive all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer

program due and owing from the date of November 1, 2005 forward to the Department of Public Works via the Barrett Law Assessment Bureau.

A copy of this Resolution is attached hereto and incorporated herein as Exhibit 3.

13. By March 2006 it became clear that the City had forgiven those homeowners, who had elected to pay the Phase I Brisbane/Manning Barrett Law Assessment in installments, all but their first year's installment payment.

14. The property owners, who elected to pay the Phase I Brisbane/Manning Barrett Law Assessment by installments, paid a maximum of $1,215.22 for the sanitary sewer improvement to their property. However, with the exception of Plaintiff Buker and Plaintiff Estate of Margaret Rosemary Richard, the Plaintiffs, who paid the assessment promptly in one lump sum, paid $9,278.00 for the same benefit to their property. These Plaintiffs are each seeking a refund from the Defendants of $8,062.78 ($9,278.00-$1,215.22).

15. Plaintiff Buker was only assessed $4,939.00, as she had previously been hooked up to a city sewer, and was entitled to a discounted assessment which she promptly paid in July 2005. She is seeking a refund of $3,423.78.

16. Plaintiff, the Estate of Margaret Rosemary Richard, 4360 Swanson Dr., initially elected to pay the assessment in installments. The first installment was paid in November 2004, and was $1.284.78. When the Estate sold the aforementioned real estate in May 2005, it had to pay off the Barrett Law

Assessment in full, with interest at closing. This amount was $8,626.22, and this is the amount the estate is seeking as a refund.

LEGAL BASIS FOR REFUND

17. By passing and implementing Resolution 101, 2005 in the manner it did, DPW administered the Phase I Brisbane/Manning Barrett Law Assessment with an unequal hand, so as to make an unjust and illegal discrimination between taxpayers in the same Tax District, who all received the same sewer hook up benefit.

18. Board of Public Works Resolution No. 101, 2005 classified taxpayers into two classes, those who paid promptly and in full and those who did not, and in allowing a remission or discount to the latter. Such a scheme violates that clause of Article 10, § 1 of the Indiana Constitution, which requires taxes to be uniform and equal upon the same class of subjects. Such a classification is unreasonable, arbitrary, and fanciful, with those who delay payments paying a smaller amount than those who pay promptly in full.

19. The application of Resolution 101, 2005 by the Board of Public Works and DPW, denied the equal protection of the laws to the class of taxpayers who had already fully paid such assessment, by arbitrarily wiping out the liability of those who elected to postpone full payment of the assessment.

20. In December 2005, the Board by its Resolution conferred a retroactive benefit to those taxpayers who elected to pay the Phase I, Brisbane/Manning Assessment in installments by forgiving all future installment payments. The result

has been that those who postponed payment of the assessment were rewarded by having up to 87% of their initial obligation wiped out, and those taxpayers who paid in full were punished by having to pay more than seven times as much as their neighbors paid for the same benefit.

21. DPW's conduct has differentiated between taxpayers who have been shown in all relevant and material respects to be alike for purposes of the assessment in question. To refuse to refund to Plaintiffs the difference between what those who elected to pay in installments paid, and the amount Plaintiffs paid, violates Article 1, § 23 of the Indiana Constitution, which prohibits granting to "any citizen, or class of citizens, privileges and immunities, which upon the same terms, shall belong to all citizens."

22. The Defendants' arbitrary classification of taxpayers, which treats those similarly situated differently, violates the mandate of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

23. Fundamental Fairness requires that the government's conduct conform to the community's sense of justice, decency, and fair play. In this case, it was fundamentally unfair to penalize the Plaintiffs who paid their Barrett Law Assessment promptly while rewarding those who elected to defer their payments. The Defendants' conduct has resulted in assessments for an identical improvement at different tax values within the same taxing unit. Such conduct by the government shocks the conscience of the average citizen by violating the

basic constitutional requirement that *identical property* is to be assessed at the *same* tax value.

24. The City of Indianapolis, through its Controller and Office of Finance and Management, has collected excess payments from the Plaintiffs on the special Barrett Law assessment on their property.

25. I.C. § 36-9-37-38 provides:

> (a) If excess payments have been made and collected on special assessments for public improvements, the municipal fiscal officer shall, not later than thirty (30) days after the discovery of the overpayment, give notice of the amount of the overpayment by mail to the owner of record of the property on which the payment was made.
>
> (b) *When the municipal fiscal officer determines the amount of the overpayment and the person or persons to whom the reimbursement should be made, the fiscal officer shall issue a refund of the overpayment to the proper person or persons.* (Emphasis added).

26. The Controller and the Office of Finance and Management Office are charged with making the determination whether or not Plaintiffs overpaid the assessment on the public improvement in an amount their neighbors were forgiven on the same assessment for the same improvement.

27. I.C.§ 36-9-37-39 provides that the municipal fiscal officer is to "determine all amounts of overpayments on the special assessment rolls for public improvements that have been unclaimed for

at least five (5) years", and "transfer and pay the unclaimed overpayments into the general fund of the municipality." A "person who is legally entitled to any money paid into the municipal general fund under section 39 of this chapter may file a claim for the money with the municipal fiscal officer." I.C. § 36-9-37-41. This latter statute requires that any claim for a refund should be submitted to the municipal fiscal officer. The fiscal officer shall pay the claim out of the general fund of the municipality if, upon investigation and proper proof of the claim, the claimant is legally entitled to the money.

28. Pursuant to I.C. §§ 36-9-40-22 through 25, it is the County Auditor who notifies the homeowner of the sewer assessment and receives payment of the assessment.

29. On April 27, 2007, Plaintiffs each filed with the Marion County Auditor a Form 17T for a refund of their excess payment of the Barrett Law Assessment against their property, which they have each paid in full. This application was filed pursuant to I.C. § 6-1.1-26-1 *et seq*. Copies of these applications for refund were also sent on that date to Kumar Menon, Director, c/o Gary Huddleston, of DPW, requesting a refund for each of the Plaintiffs.

30. To date neither the Marion County Auditor, the City of Indianapolis, nor any of the other Defendants has responded to Plaintiffs' Applications for Refund of their excess Barrett Law Assessment payments.

42 U.S.C. § 1983 ACTION

31. Plaintiffs incorporate by reference the foregoing rhetorical paragraphs 1 through 30 as if fully set forth herein.

32. Within 180 days of learning of the implementation of Resolution No. 101, 2005 and the City's decision to forgive all installment payments of the Phase I, Brisbane/Manning Barrett Law Assessment after November 1, 2005, but not to grant those parties who had promptly paid the full amount any refund, the Northern Estates Home Owners Association on behalf of all Plaintiffs named herein, notified the Director of DPW, James Garrard, with reasonable certainty of their claims for a refund and the circumstances surrounding their claims, advised the City of its intent to pursue legal action, and gave the city sufficient information in their notice to afford it an opportunity to investigate the claim. This was substantial compliance with I.C. § 34-13-3-8.

33. The refusal by the Defendants to refund to Plaintiffs the difference between what those who elected to pay in installments paid, and the amount Plaintiffs promptly paid in full, violates Article 10, § 1 and Article 1, § 23 of the Indiana Constitution and the Fourteenth Amendment of the Constitution of the United States. This is an unlawful deprivation of Plaintiffs' property by the City of Indianapolis, acting under state and municipal law, in violation of 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs request the Court to enter judgment against Defendants, award a refund of $8,062.78 to each Plaintiff, other than Plaintiff Buker, who should be awarded a refund of $3,423.78,

and Plaintiff Richard Estate who should be awarded a refund of $8,626.22, plus 4% interest per annum on all refunds awarded, award each Plaintiff their expenses in bringing this action, including reasonable attorneys' fees and costs.

DECLARATORY RELIEF

34. Plaintiffs, incorporate by reference the foregoing rhetorical paragraphs 1 through 33 as if fully set forth herein.

35. Pursuant to Rule 57 of the Indiana Rules of Trial Procedure and the Indiana Uniform Declaratory Judgment Act, I.C. § 34-14-1-1, each Plaintiff seeks a declaratory judgment declaring their rights under the Indiana Constitution and the Constitution of the United States, to a refund of each Plaintiff's excess payment of the Barrett Law Assessment on their property, which they promptly paid in full.

36. An actual, substantial, and bona fide controversy exists between Plaintiffs and Defendants of such immediacy to warrant the rendering of a declaratory judgment as to the respective rights of the parties.

37. A declaratory judgment would serve the useful purpose of settling the controversy regarding Plaintiffs' entitlement to pursue claims against Defendants, whether Plaintiffs' claims may be pursued in this Court, or whether Plaintiffs must exhaust their administrative remedies and seek ultimate resolution through the Indiana Tax Court.

Specifically, Plaintiffs request a declaratory judgment on the following matters:

A. Whether Plaintiffs must exhaust their administrative remedies by filing a claim for refund pursuant to I.C. § 6-1.1-26-1 *et seq.*, and if so, the administrative process to be followed,

B. Whether this court is the proper forum and has jurisdiction to decide the constitutional and tort issues involved in this case, and if so, whether Plaintiffs have a right to a refund of their excess Barrett Law Assessment Payment to the City of Indianapolis, and

C. That each Plaintiff, other than Alvera Buker and the Richard Estate, is entitled to a refund from the Defendant City of Indianapolis of $8,062.78, and that Plaintiff Buker is entitled to a refund of $3,423.78, and the Richard Estate is entitled to a refund of $8,626.22, plus 4% interest per annum on any amount, plus reasonable attorneys' fees and costs.

COMPENSATORY RELIEF

38. Plaintiffs incorporate by reference the foregoing rhetorical paragraphs 1 through 37 as if fully set forth herein.

39. Plaintiffs have all paid an amount in excess of their fair share of the Barrett Law Assessment levied against their real property by Defendants and are entitled to a refund of such excess, plus 4% per annum on such amount.

40. Failure to refund this excess to each Plaintiff is a wrongful taking by the City of money rightfully belonging to Plaintiffs.

WHEREFORE, Plaintiffs request the Court to award a refund of $8,062.78 to each Plaintiff, other than the Plaintiff Buker, who should be awarded a refund of $3,423.78, and Plaintiff Richard Estate who should be awarded a refund of $8,626.22, plus 4% interest per annum on all refunds awarded.

MANDAMUS RELIEF

41. Plaintiffs, incorporate by reference the foregoing rhetorical paragraphs 1 through 40 as if fully set forth herein.

42. In the alternative, if the Court finds that Plaintiffs must exhaust their administrative remedies pursuant to I.C. § 6-1.1-26-1, Plaintiffs asks for a *writ of mandamus* directed to Defendant Billie J. Breaux, the Marion County Auditor, who has refused to consider, approve or deny Plaintiffs' April 27, 2007 Form 17T applications for a refund.

43. If an exhaustion of administrative remedies is found to be required by this Court, a decision by the Auditor is necessary before an appeal can be taken to the Indiana Board of Tax Review or the Indiana Tax Court.

44. If this Court determines that administrative remedies must be exhausted, then the Defendant Marion County Auditor has a statutory duty to make a determination relating to Plaintiffs' applications for refund and so notify the Plaintiffs of her decision.

WHEREFORE, if this Court determines that Plaintiffs must exhaust their administrative remedies under I.C. § 6-1.1-26-1, Plaintiffs request that this Court order the Defendant Marion County Auditor, within 30 days of the Order, to notify

Plaintiffs of her decision regarding Plaintiffs' Form 17T applications for a refund, and of the proper appeal procedure if she denies any such applications.

Respectfully submitted.

PRICE WAICUKAUSKI & RILEY, LLC

/s/

Ronald J. Waicukauski, Atty. No. 1089-53
R. Davy Eaglesfield, III, Atty. No. 6637-49
The Hammond Block Building
301 Massachusetts Avenue
Indianapolis, IN 46204
Telephone: 317-633-8787
Facsimile: 317-633-8797

Northern Estates (NEHA)

Client	Address	Parcel/ Schedule #	TOTAL PAID	TOTAL DUE	OVER PAYMENT
Christine Armour	339 W. 39th Street, Indianapolis, IN 46208	6001950	9,278.00	1,215.22	8,062.78
David A. Bird	4321 Melbourne Rd., Indianapolis, IN 46228	6001563	9,278.00	1,215.22	8,062.78
Alvera C. Buker	4502 Manning Rd., Indianapolis, IN 46228	6001736	4,639.00	1,215.22	3,423.78
Joseph Cumberlander Rozzetta Cumberlander	4347 Kessler Blvd. N. Dr., Indianapolis, IN 46228	8038608	9,278.00	1,215.22	8,062.78
Alice J. Detzler Dickson F. Detzler (deceased)	Property: 4215 Manning Rd., Indianapolis, IN 46228 Current: 8361 Beulahland Place, Indianapolis, IN 46256	6001968	9,278.00	1,215.22	8,062.78
James Donahue Renate Donahue	4408 Swanson Dr., Indianapolis, IN 46228	8003976	9,278.00	1,215.22	8,062.78
Kenneth J. Eiler Mary Jane Eiler	4301 Lincoln Rd., Indianapolis, IN 46228	8003281	9,278.00	1,215.22	8,062.78
Estate of Ruth Virginia Enmeier Sandra Kay Hevron, Per. Rep.	Property: 4210 Manning Rd., Indianapolis, IN 46228 Per. Rep.: 8715 Gunpowder Dr., Indianapolis, IN 46256	6001992	9,278.00	1,215.22	8,062.78
David A. Fellabaum Heather R. Fellabaum	Property: 3412 Breckenridge Dr., Indianapolis, IN 46228 Current: 10160 Partridge Place, Carmel, IN 46033	6001531	9,278.00	1,215.22	8,062.78

Northern Estates (NEHA)

Client	Address	Parcel/ Schedule #	TOTAL PAID	TOTAL DUE	OVER PAYMENT
Nancy Lee Gahl	4240 Lincoln Rd., Indianapolis, IN 46228	6005404	9,278.00	1,215.22	8,062.78
David M. Gibson, Trustee Margaret Lockhart Gibson Trust Mark C. Gibson (present occupant)	Property: 3436 Brisbane Rd., Indianapolis, IN 46228 Trustee: 1745 Graham Rd., Mansfield, OH 44904	6005026	9,278.00	1,215.22	8,062.78
Estate of Robert E. Haesloop Ingeborg Haesloop, Executrix	3325 Breckenridge Dr., Indianapolis, IN 46228	8004243	9,278.00	1,215.22	8,062.78
Robert E. Holt June E. Holt	3506 Brisbane Rd., Indianapolit, IN 46228	6001978	9,278.00	1,215.22	8,062.78
Frank S. Johnson Jeanne A. Johnson	4308 Manning Rd., Indianapolis, IN 46228	6001976	9,278.00	1,215.22	8,062.78
Edward J. Kelly Erika M. Kelly	4440 Manning Rd., Indianapolis, IN 46228	6002662	9,278.00	1,215.22	8,062.78
Leonard Kirksey Colleen Kirksey	4301 Swanson Dr., Indianapolis, IN 46228	8002839	9,278.00	1,215.22	8,062.78
Carlos O. Kreamer Katrina V. Kreamer	3434 Brisbane Rd., Indianapolis, IN 46228	6001945	9,278.00	1,215.22	8,062.78
Frank P. Lloyd, Jr. Bettye Jo Lloyd	4461 Sylvan Dr., Indianapolis, IN 46228	8002249	9,278.00	1,215.22	8,062.78

Northern Estates (NEHA)

Client	Address	Parcel/ Schedule #	TOTAL PAID	TOTAL DUE	OVER PAYMENT
William H. Main, Jr. Sue Ellen Main	3250 Rutledge Dr., Indianapolis, IN 46228	6001557	9,278.00	1,215.22	8,062.78
Wilma M. Marley	3418 Rutledge Dr., Indianapolis, IN 46228	6000167	9,278.00	1,215.22	8,062.78
Geoffrey H. Michels Dinah J. Michels	4370 Grayson Dr., Indianapolis, IN 46228	6001974	9,278.00	1,215.22	8,062.78
Norma Jean Morgan Paul Eugene Morgan (divorced)	Property: 4309 Lincoln Rd., Indianapolis, IN 46228 Current: 16A Stevens Dr., Plainfield, IN 46168	8003890	9,278.00	1,215.22	8,062.78
Zora Nathan Harry Zora (deceased)	4303 Melbourne Rd. E. Dr., Indianapolis. IN 46228	8004386	9,278.00	1,215.22	8,062.78
Frank D. Neese Sharon L. Neese	4343 Manning Rd., Indianapolis, IN 46228	6001559	9,278.00	1,215.22	8,062.78
Donnis D. Patton	3315 Rutledge Dr., Indianapolis, IN 46228	6000277	9,278.00	1,215.22	8,062.78
Viesturs M. Purvlicis Carolyn Purvlicis	4401 Lincoln Rd., Indianapolis, IN 46228	8006998	9,278.00	1,215.22	8,062.78
Estate of Margaret Rosemary Richard Susan Moe (Co-Executrix)	4360 Swanson Dr., Indianapolis, IN 46228	8006151	9,911.00	1,284.78	8,626.22
M. Evelyn Rogers	4435 Lincoln Rd., Indianapolis, IN 46228	8000438	9,278.00	1,215.22	8,062.78

Northern Estates (NEHA)

Client	Address	Parcel/ Schedule #	TOTAL PAID	TOTAL DUE	OVER PAYMENT
Mrs. Clifford A. Short	3210 Breckenridge Dr., Indianapolis, IN 46228	8004504	9,278.00	1,215.22	8,062.78
Louis J. Urbancic, Jr. Linda J. Urbancic	4310 Melbourne Rd. E. Dr., Indianapolis, IN 46228	8003889	9,278.00	1,215.22	8,062.78
Mary B. Williams	9021 Knights Ct., Indianapolis, IN 46250	8003834	9,278.00	1,215.22	8,062.78

EXHIBIT 1

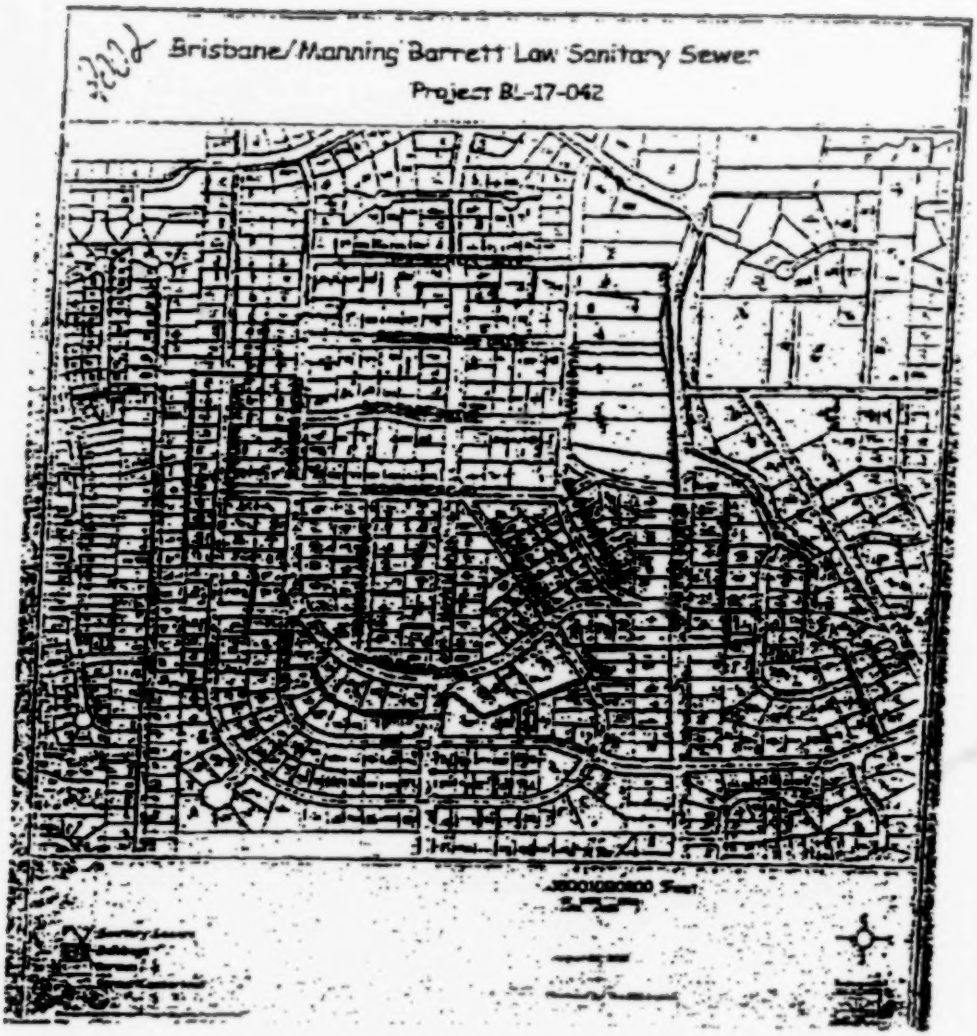
Brisbane/Manning Barrett Law Sanitary Sewer
Project BL-17-042

EXHIBIT 2

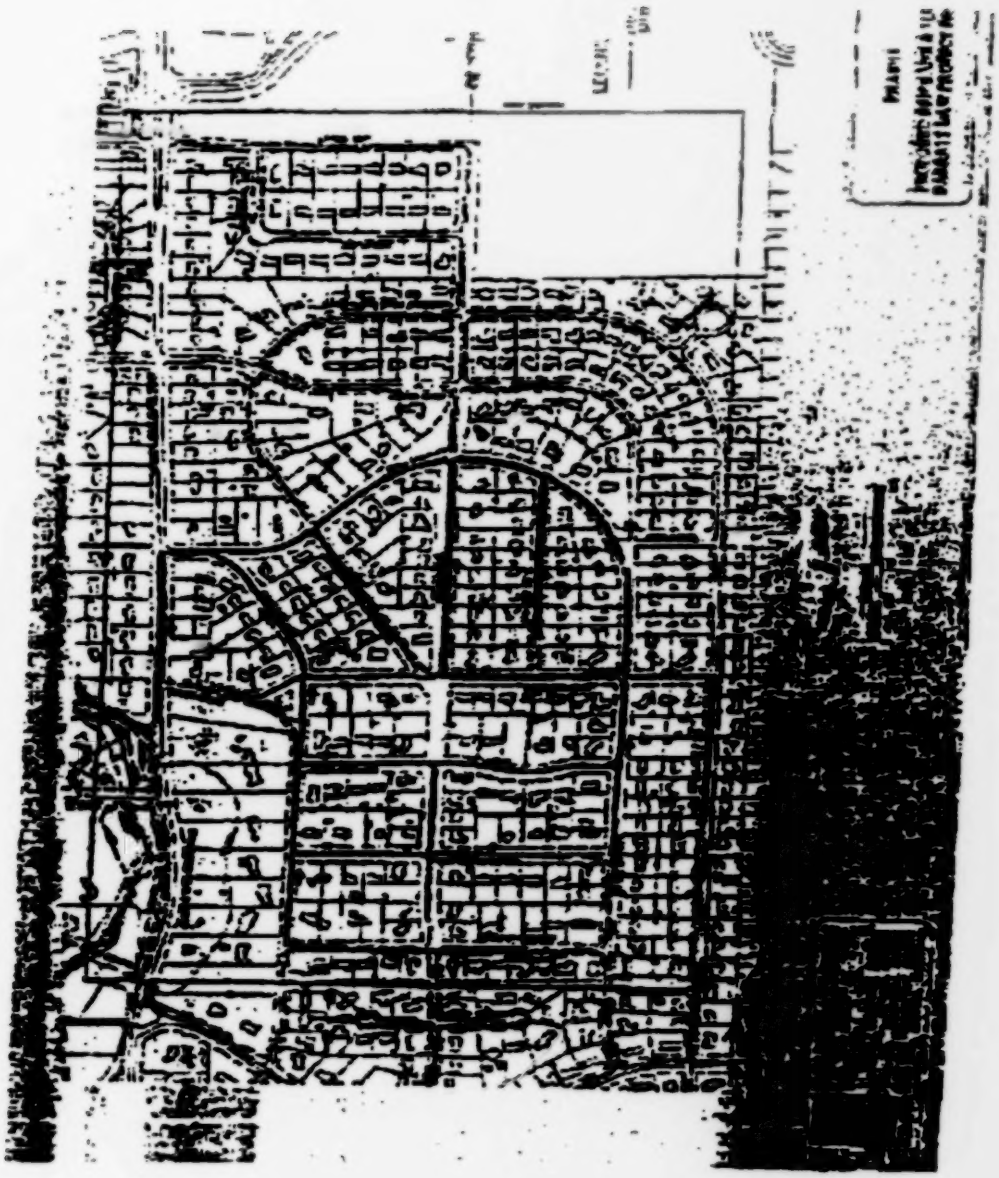

EXHIBIT 2, p. 2

STATE OF INDIANA	)	IN THE MARION
	)SS:	COUNTY SUPERIOR
COUNTY OF MARION	)	COURT
	)	
	)	CAUSE NO. 49D11-0706-CT-026050
	)	

CHRISTINE ARMOUR, DAVID A. BIRD, ALVERA C. BUKER, JOSEPH and ROZZETTA CUMBERLANDER, ALICE J. DETZLER (Dickson F. Detzler, deceased), JAMES and RENATE DONAHUE, KENNETH J. and MARY JANE EILER, SANDRA KAY HEVRON, Personal Representative of the Estate of Ruth Virginia Enmeier, DAVID A. and HEATHER R. FELLABAUM, NANCY LEE GAHL, DAVID M. GIBSON, Trustee of the Margaret Lochart Gibson Trust, INGEBORG HAESLOOP, Executrix of the Estate of Robert E. Haesloop, ROBERT E. and JUNE E. HOLT, FRANK S. and JEANNE A. JOHNSON, EDWARD J. AND ERIKA M. KELLY, LEONARD and COLLEEN E. KIRKSEY, CARLOS O. and KATRINA V. KREAMER, FRANK P., JR. and BETTYE JO LLOYD, WILLIAM H., JR. and SUE ELLEN MAIN, WILMA M.	)	FILED
	)	86 SEP 27 2007

MARLEY, GEOFFREY H. and DINAH J. MICHELS, NORMA JEAN MORGAN, ZORA NATHAN (Harry Nathan, deceased), FRANK D. and SHARON L. NEESE, DONNIS D. PATTON, VIESTRUS M. and CAROLYN PURVLICIS, SUSAN MOE, Co-Executrix of the Estate of Margaret Rosemary Richard, M. EVELYN ROGERS, MRS. CLIFFORD A. SHORT, LOUIS J. JR. and LINDA J. URBANCIC and MARY B. WILLIAMS,

Plaintiffs,

v.

THE CITY OF INDIANAPOLIS, BART PETERSON, Mayor of the City of Indianapolis, INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, INDIANA BOARD OF PUBLIC WORKS, ROBERT J. CLIFFORD, Controller of the City of Indianapolis, INDIANAPOLIS OFFICE OF FINANCE AND MANAGEMENT and BILLIE J. BREAUX, Marion County Auditor,

Defendants.

ANSWER AND REQUEST FOR JURY TRIAL

Defendants, The City of Indianapolis, Bart Peterson, Mayor of the City of Indianapolis, Department of Public Works, Indiana Board of Public Works, Robert J. Clifford, Controller of the City of Indianapolis, Indianapolis Office of Finance and Management and Billie J. Breaux, Marion County Auditor, by counsel, hereby answer Plaintiffs' complaint as follows:

PARTIES

1. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph I of Plaintiff's Complaint, and therefore deny the same.

2. Defendants admit that the City of Indianapolis is a municipality in the State of Indiana as contained in Paragraph 2 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 2 of Plaintiff's Complaint, and therefore deny the same.

3. Defendants admit only that the Department of Public Works is a department created pursuant to Indiana Code 36-3-4-23 for the City of Indianapolis but deny any remaining allegations contained in Paragraph 3 of Plaintiffs' Complaint.

4. [Blank in Original]

5. Defendants admit only that Robert J. Clifford is the Controller for the City of Indianapolis, Defendants are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 5 of Plaintiffs' Complaint and therefore deny the same.

6. Defendants admit only that Billie J. Breaux is the Marion County Auditor, Defendants are without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 6 of Plaintiffs' Complaint and therefore deny the same.

FACTS

7. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 7 of Plaintiffs' Complaint, and therefore deny the same.

8. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 8 of Plaintiffs' Complaint and therefore deny the same.

9. Defendants deny the allegations contained in Paragraph 9 of Plaintiffs' Complaint.

10. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 10 of Plaintiffs' Complaint and therefore deny the same.

11. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 of Plaintiffs' Complaint, and therefore deny the same.

12. Defendants admit only that in Paragraph 12 of Plaintiffs' Complaint, Plaintiffs quote a portion of the language contained in RESOLUTION NOL 101, 2005, but deny any allegations that may be contained therein.

13. Defendants deny the allegations contained in Paragraph 13 of Plaintiffs' Complaint.

14. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 14 of Plaintiffs' Complaint, and therefore deny the same.

15. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 of Plaintiffs' Complaint, and therefore deny the same.

16. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 of

Plaintiffs' Complaint, and therefore deny the same.

LEGAL BASIS FOR REFUND

17. Defendants deny the allegations contained in Paragraph 17 of Plaintiffs' Complaint.

18. Defendants deny the allegations contained in Paragraph 18 of Plaintiffs' Complaint.

19. Defendants deny the allegations contained in Paragraph 19 of Plaintiffs' Complaint.

20. Defendants deny the allegations contained in Paragraph 20 of Plaintiffs' Complaint.

21. Defendants deny the allegations contained in Paragraph 21 of Plaintiffs' Complaint.

22. Defendants deny the allegations contained in Paragraph 22 of Plaintiffs' Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of Plaintiffs' Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of Plaintiffs' Complaint.

25. Defendants admit only that Indiana Code §36-9-37-38(a) and (b) is law that speaks for itself and Defendants deny any allegations that may be contained in Paragraph 25 of Plaintiffs' Complaint.

26. Defendants deny the allegations contained in Paragraph 26 of Plaintiffs' Complaint.

27. Defendants admit only that Indiana Code §36-9-37-39 and §36-9-37-41 is law that speaks for itself and Defendants deny any allegations contained in Paragraph 27 of Plaintiffs' Complaint.

28. Defendants admit only that Indiana Code §36-9-40-22 is law that speaks for itself and Defendants deny any allegations contained in Paragraph 28 of Plaintiffs' Complaint.

29. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' Complaint, and therefore deny the same.

30. Defendants deny the allegations contained in Paragraph 30 of Plaintiffs' Complaint.

42 U.S.C. § 1983 ACTION

31. Defendants hereby incorporate by reference their responses to paragraphs one (1) through thirty (30) as if fully set forth herein.

32. Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 32 of Plaintiffs' Complaint and therefore deny the same.

33. Defendants deny the allegations contained in Paragraph 33 of Plaintiffs' Complaint.

Defendants deny that they are liable to Plaintiffs for damages and deny that Plaintiffs are entitled to any of the relief requested in Plaintiffs' Complaint.

DECLARATORY RELIEF

34. Defendants hereby incorporate by reference their responses to paragraphs one (1) through thirty-three (33) as if fully set forth herein.

35. Defendants admit only that Indiana Code §34-14-1-1 is law that speaks for itself. Rule 57 of the Indiana Rules of Trial Procedure speaks for itself and Defendants deny the remaining allegations contained in Paragraph 35 of Plaintiffs' Complaint.

36. Defendants deny the allegations contained in Paragraph 36 of Plaintiffs' Complaint.

37. Defendants deny the allegations contained in Paragraph 37, including sub-sections A, B and C of Plaintiffs' Complaint.

COMPENSATORY RELIEF

38. Defendants hereby incorporate by reference their responses to paragraphs one (1) through thirty-seven (37) as if fully set forth herein.

39. Defendants deny the allegations contained in Paragraph 39 of Plaintiffs' Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of Plaintiffs' Complaint.

Defendants deny that they are liable to Plaintiffs for damages and deny that Plaintiffs are entitled to any of the relief requested in Plaintiffs' Complaint.

MANDAMUS RELIEF

41. Defendants hereby incorporate by reference their responses to paragraphs one (1) through forty (40) as if fully set forth herein.

42. Defendants deny the allegations contained in Paragraph 42 of Plaintiffs' Complaint.

43. Defendants deny the allegations contained in Paragraph 43 of Plaintiffs' Complaint.

44. Defendants deny the allegations contained in Paragraph 44 of Plaintiffs' Complaint.

WHEREFORE, Defendants, The City of Indianapolis and the Department of Public Works, by counsel, request that the Court grant judgment in their favor, that Plaintiff takes nothing by way of his Complaint, for costs of this action, and all other just and proper relief.

AFFIRMATIVE DEFENSES

Defendants, The City of Indianapolis and the Department of Public Works, assert the following affirmative defenses to Plaintiffs' Complaint, subject to discovery:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

2. Defendants did not proximately cause Plaintiffs' injuries or losses, if any are found to exist.

3. The injuries and/or damages which Plaintiffs allege, were the proximate result of the risk voluntarily incurred and/or assumed by Plaintiffs.

4. Defendants are immune from liability pursuant to the Indiana Tort Claims Act, Indiana Code §34-13-3-3.

5. Plaintiff's damages are limited pursuant to the Indiana Tort Claims Act, Indiana Code §34-13-3-4.

6. Defendants, The City of Indianapolis Bart Peterson, Mayor of the City of Indianapolis, Department of Public Works, Indiana Board of Public Works, Robert J. Clifford, Controller of the City of Indianapolis, Indianapolis Office of Finance and Management and Billie J. Breaux, Marion County Auditor, reserve any and all rights they may have to raise additional affirmative defenses that may develop through the course of discovery in this litigation.

WHEREFORE, Defendants, The City of Indianapolis, Bart Peterson, Mayor of the City of Indianapolis, Department of Public Works, Indiana Board of Public Works, Robert J. Clifford, Controller of the City of Indianapolis, Indianapolis Office of Finance and Management and Billie J. Breaux, Marion County Auditor, by counsel, request that the

Court grant judgment in their favor, that Plaintiffs take nothing by way of their Complaint, for costs of this action, all other just and proper relief and request that the Court deny the Plaintiffs' request for *Writ of Mandamus*.

REQUEST FOR JURY TRIAL

The Defendants request trial by jury.

Respectfully Submitted,

OFFICE OF CORPORATION COUNSEL

By: /s/

Eleanor K. Finnell, Atty. No. 22023-49
Assistant Corporation Counsel
200 E. Washington Street, Suite 1601
Indianapolis, Indiana 46204
Telephone: (317) 327-4055

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon all counsel listed below, by United States mail, first-class, postage prepaid on this 27th day of September 2007.

Ronald J. Waicukauski
R. Davy Eaglesfield, III
PRICE WAICUKAUSKI & RILEY, LLC
The Hammond Block Building
30 Massachusetts Avenue
Indianapolis, IN 46204

/s/
Eleanor K. Finnell
Assistant Corporation Counsel

Office of Corporation Counsel
City County Building
200 East Washington Street, Suite 1601
Indianapolis, IN 46204
Telephone: (317) 327-4055
Fax: (317) 327-3968

STATE OF INDIANA	)	IN THE MARION
	)SS:	COUNTY SUPERIOR
COUNTY OF MARION	)	COURT
	)	
	)	CAUSE NO. 49D11-0706-CT-026050
	)	

CHRISTINE ARMOUR, et al., Plaintiffs,

vs.

CITY OF INDIANAPOLIS, et al., Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND DESIGNATION OF EVIDENCE

Ronald J. Waicukauski, Atty. No. 1089-53
R. Davy Eaglesfield, Atty. No. 6637-49
PRICE WAICUKAUSKI & RILEY, LLC
The Hammond Block Building
301 Massachusetts Avenue
Indianapolis, IN 46204
Telephone: 317-633-8787
Facsimile: 317-633-8797
rwaicukauski@price-law.com
deaglesfield@price-law.com
ATTORNEYS FOR PLAINTIFFS

* * *

[Pleading Omitted; Relevant Affidavit and Exhibits Attached]

STATE OF INDIANA	)	IN THE MARION
	)SS:	COUNTY SUPERIOR
COUNTY OF MARION	)	COURT
	)	
	)	CAUSE NO. 49D11-0706-CT-026050

CHRISTINE ARMOUR, et al..)
Plaintiffs.)
)
vs.)
)
CITY OF INDIANPOLIS, et al..)
Defendants.)

AFFIDAVIT OF INGEBORG HAESLOOP

I, Ingeborg Haesloop, being duly sworn upon my oath, depose, say and affirm:

1. This Affidavit is made upon my personal knowledge.

2. I am an adult over the age of 18 competent to testify as to the matters contained in this Affidavit.

3. I currently reside at 3325 Breckenridge Drive, Indianapolis, Indiana.

4. At all times relevant herein, I resided at the above address in the Northern Estates neighborhood. My residence is located on parcels

191 and 198 within Northern Estates, and I am the current sole owner of these parcels.

5. In 2002, my husband Robert and I, along with our neighbors, were notified by the City of Indianapolis of the Phase I Brisbane & Manning Barrett Law Sanitary Sewer Project BL-17-042. The City supplied me with the attached diagrams detailing the boundaries of the Project and the locations where the sewer lines were to be installed. These diagrams are designated as and attached to Plaintiffs' Brief in Support of Summary Judgment, as Designated Evidence, Exhibits 1 and 2, respectively.

6. Exhibit 1 shows the boundaries of the Project, which includes Devereaux Drive and Breckenridge Drive on the North, Melbourne Road on the West, Manning Road on the South and Kessler Boulevard on the East. Within the perimeter of these boundaries are Grayson Avenue, Lincoln Road, Melbourne Road, Swanson Drive, Brisbane Road, Sylvan Road, and Rutledge Road.

7. Exhibit 2 is a diagram showing in dark lines the proposed path of the new sewer lines along the aforementioned streets, within the Project. A review of this diagram shows that the residences on parcels abutting the aforementioned roads, within the circumference of the project, were to be connected to the proposed sanitary sewer.

8. On or about June 2004, I received a billing for $9,278 concerning the Brisbane & Manning Barrett Law Assessment, which was made

out to my late husband, Robert E. Haesloop, 3325 Breckenridge Drive.

9. At the time I received this billing, I was the Executrix for the Estate of Robert E. Haesloop; and on July 7, 2004, I paid, on behalf of the Estate, the full principal amount of the assessment ($9,278) to the City and received a receipt from the City Controller's Office.

10. On or about December 23, 2005, I received in the mail a letter dated December 22, 2005 from the City of Indianapolis listing the property owners within the Northern Estates Home Owners Association whose Barrett Law Assessments were paid in full. This letter is attached to and designated as Designated Evidence, Exhibit 4, in Plaintiffs' Brief in Support of Summary Judgment.

11. On or about March 9, 2006, I received a letter dated March 8, 2006 from the City of Indianapolis, signed by James Garrard denying a refund to 38 members of the Northern Estate Home Owners Association, whose Barrett Law Assessments had been paid in full. This letter is attached to and designated as Designated Evidence, Exhibit 7, in Plaintiffs' Brief in Support of Summary Judgment.

Further Affiant saith naught.

Dated: 02/18/08 /s/ Ingeborg Haesloop

Ingeborg Haesloop,
Executrix of the Estate of
Robert E. Haesloop

OFFICIAL SEAL
JEFFREY K. LUDLOW
NOTARY PUBLIC – INDIANA
MARION COUNTY
My Comm. Expires Jan. 6.
2013

STATE OF INDIANA)
) SS:
COUNTY OF _____)

Before me the undersigned, a Notary Public for the County of Marion, State of Indiana, personally appeared Ingeborg Haesloop, and she, being first duly sworn by me upon her oath, says that the facts alleged in the foregoing instrument are true.

Signed and sealed this 18 day of Feb, 2008.

County of Residence:
Marion

/s/ Jeffrey K. Ludlow
Notary Public

My Commission Expires:
1-6-2013

Jeffrey K. Ludlow
Printed Name

EXHIBIT 1

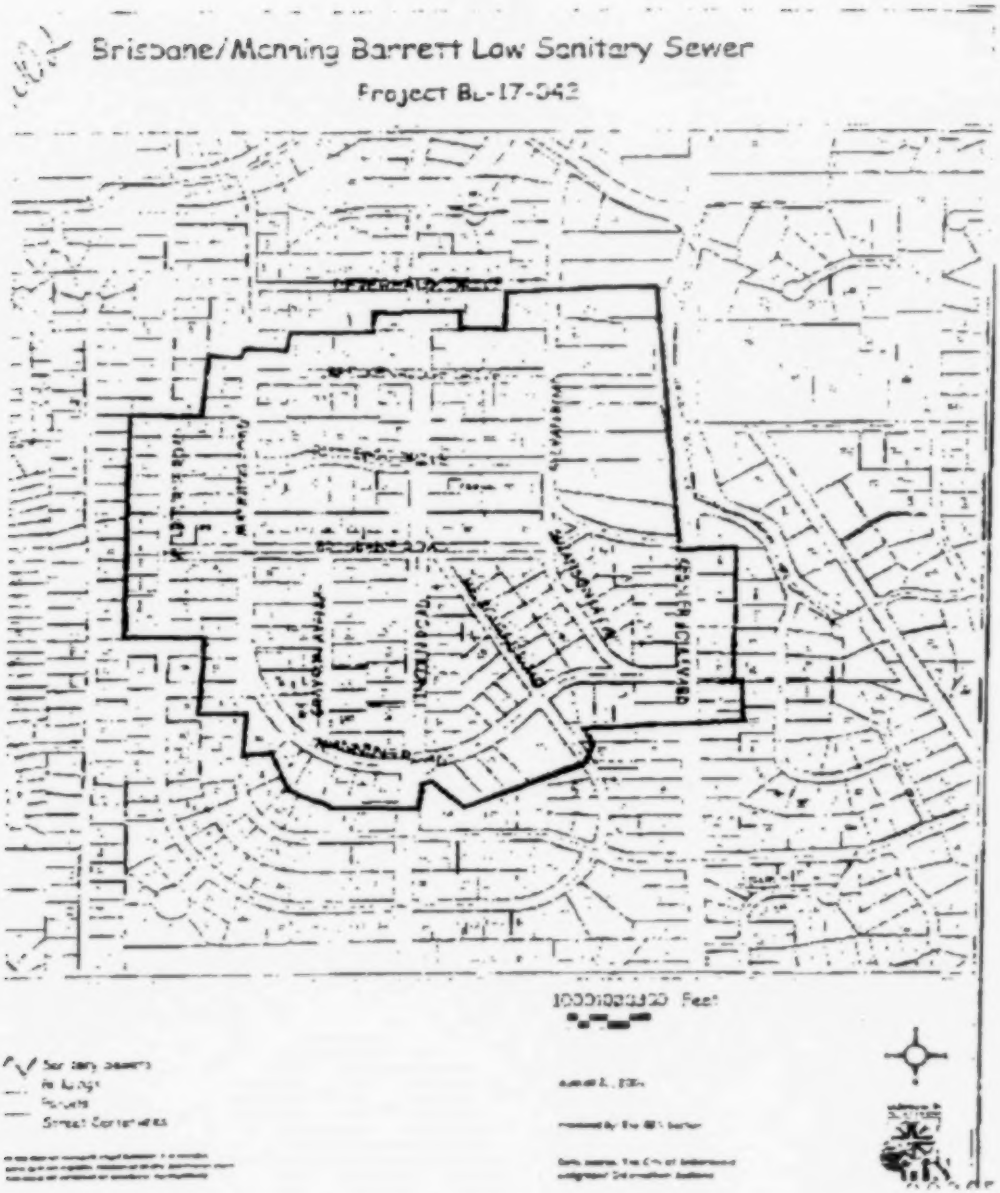
Brisbane/Manning Barrett Low Sanitary Sewer
Project BL-17-042

EXHIBIT 7

City of Indianapolis
Bart Peterson, Mayor
[letterhead]

March 8, 2006

Ms. Ingeborg Haesloop
Northern Estates Homeowners' Association
P.O. Box 8805
Indianapolis, IN 46208

Re: Northern Estates Homeowners' Association
Refund of Barrett Law Assessment Payments

Dear Ms. Haesloop,

The City of Indianapolis – Department of Public Works (City) is in receipt of a request from representatives of the Northern Estates Homeowners' Association (NEHA), dated February 4, 2006 for refund of 38 NEHA members' Barrett Law payments for $9,278 each. I apologize for the delay in response to you.

In your letter, you reference the City-County Council proposal forgiving all outstanding Barrett Law debt and discontinuing the use of the Barrett Law as a financing method for septic conversion projects. To clarify, the forgiving of Barrett Law Assessments was done by the Board of Public Works via Resolution No. 101-2005 passed on December 7, 2005, a copy of which is attached for your reference. This Board action was in response to the City-County Council Proposal No. 535 passed on October

31, 2005 to create a new way to handle sewer conversions, phasing out Barrett Law.

Your letter references Indiana Code (IC) 36-9-39-15, which is the provision in state law establishing that costs for Barrett Law projects shall be equally apportioned among the affected lots. This was the case in your particular project area—each lot, parcel, or property was assessed the same amount to finance this project under a legally established process that the City utilized at that time. However, since the effective date of the ordinance creating a connection fee and sewer user rate increases (Proposal No. 535), the City no longer utilizes the Barrett Law for septic conversions, so the provisions of IC 36-9-39-15 no longer apply. A comparison between past Barrett Law projects and future septic tank elimination projects is not relevant because the projects are now financed in different ways and conducted under different legal requirements.

The selection of project areas is an engineering decision based upon numerous interrelated financial, engineering, public health and geographical factors. The fact that the projects were divided into a 'Phase I' and a 'Phase II' underscores that both projects are considered separate and distinct projects established under the Barrett Law statutory framework. In other words, each of these projects had their own separate and distinct design, plans, project number, bids, hearings before the Board of Public Works, etc. In establishing project areas, the City's intent is to treat property owners within each project area equitably, based upon the scope and value of each specific project.

The particular project area in which you reside is one of over 40 Barrett law projects the City has constructed in the past. The circumstances of this project being constructed closer to the date in which the City chose to eliminate using Barrett Law statute as a method of providing sewers to unsewered areas is one of prioritization. We recognize that the time frame would suggest to you that refunds are warranted, but the fact that this was a recent use of Barrett Law does not distinguish it from previous projects constructed using the same funding mechanism. Refunding payments made in your project area, or any portion of the payments, would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments. The Board of Public Works made a decision to forgive Barrett Law assessments made after November 1, 2005 (see attached resolution) and while this date might seem arbitrary to you, it is essential for the City to establish this date and move forward with the new funding approach.

Please do not hesitate to contact Paul Amico of the Clean Stream Office at 327-8472 if you have any additional questions regarding this matter.

Sincerely,
/s/ James A. Garrard
James A. Garrard, Director
Department of Public Works

cc: Councilor Monroe Gray, Jr., 8th District
Councilor Greg Bowes, 7th District

STATE OF INDIANA	)	IN THE MARION
	)SS:	COUNTY
COUNTY OF	)	SUPERIOR COURT
MARION	)	
	)	CAUSE NO. 49D11-
	)	0706-CT-026050
CHRISTINE ARMOUR, DAVID A. BIRD, ALVERA C. BUKER, JOSEPH and ROZZETTA CUMBERLANDER, ALICE J. DETZLER (Dickson F. Detzler, deceased), JAMES and RENATE DONAHUE, KENNETH J. and MARY JANE EILER, SANDRA KAY HEVRON, Personal Representative of the Estate of Ruth Virginia Enmeier, DAVID A. and HEATHER R. FELLABAUM, NANCY LEE GAHL, DAVID M. GIBSON, Trustee of the Margaret Lochart Gibson Trust, INGEBORG HAESLOOP, Executrix of the Estate of Robert E. Haesloop, ROBERT E. and JUNE E. HOLT, FRANK S. and JEANNE A. JOHNSON, EDWARD J. AND ERIKA M. KELLY, LEONARD and COLLEEN E. KIRKSEY, CARLOS O. and KATRINA V.	)	FILED 86 May 29 2008 *Elizabeth L. White* CLERK OF THE MARION CIRCUIT COURT

KREAMER, FRANK P., JR. and BETTYE JO LLOYD, WILLIAM H., JR. and SUE ELLEN MAIN, WILMA M. MARLEY, GEOFFREY H. and DINAH J. MICHELS, NORMA JEAN MORGAN, ZORA NATHAN (Harry Nathan, deceased), FRANK D. and SHARON L. NEESE, DONNIS D. PATTON, VIESTRUS M. and CAROLYN PURVLICIS, SUSAN MOE, Co-Executrix of the Estate of Margaret Rosemary Richard, M. EVELYN ROGERS, MRS. CLIFFORD A. SHORT, LOUIS J. JR. and LINDA J. URBANCIC and MARY B. WILLIAMS,

Plaintiffs,

v.

THE CITY OF INDIANAPOLIS, BART PETERSON, Mayor of the City of Indianapolis, INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, INDIANA BOARD OF PUBLIC WORKS, ROBERT J. CLIFFORD, Controller of the City of Indianapolis,

INDIANAPOLIS OFFICE OF FINANCE AND MANAGEMENT and BILLIE J. BREAUX, Marion County Auditor,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DESIGNATION OF EVIDENCE

* * *

[Pleading Omitted; Relevant Exhibits Attached]

EXHIBIT A

City of Indianapolis – Bart Peterson, Mayor

MEETING NOTICE
Indianapolis Department of Capital Asset Management

604 North Sherman Drive
Indianapolis, Indiana 46201
[letterhead]

April 26, 2001

RE: Brisbane/Manning Barrett Law Sanitary Sewers Project BL-17-042

The Department of Public Works (DPW) of the City of Indianapolis has scheduled a public information meeting to discuss the proposed design plans and construction schedule for the installation of sanitary sewers in your neighborhood The design plans for this project are complete and will be available at this meeting for your review and comment. These plans will show the proposed locations for lateral stub-outs for connections to the sanitary line.

The meeting will be held at 7 p.m. Wednesday, May 9, 2001, in the cafeteria of the Guion Creek Middle School, located at 4401 W. 52nd St., Indianapolis.

Also, City staff will be on hand to discuss the costs associated with this project and the assessment range that will be recommended to the Public Works Board. If, at the First Public Hearing for this

project, the Board approves this assessment range, then the per benefited lot assessments for this project will not exceed that range.

It is very important to us that you are aware that if this project moves forward, all property owners benefiting from this project will be responsible for a portion of the cost of it.

Please join us at **7 p. m. Wednesday, May 9th.**

EXHIBIT B

Brisbane/Manning Barrett Law Sanitary Sewer Project
BL-17-042
Design Public Information Meeting
May 9, 2001

Barrett Law Coordinator	Pegg Warnick 327-8314, pwarnick@IndyGov.org
Project Manager	Sandy Shafer 327-4546, sshafer@IndyGov.org
Project Planner	Lori Weiss 327-5047, lweiss@IndyGov.org
Design Engineers	Denise McClanahan, Clark-Dietz, Inc. 259-4644, Denisem@clark-dietz.com
Marion County Health and Hospital	Lisa Kaufman, Hal Besse & Mike Goodin Marion County Health & Hospital Corporation 221-2147

Agenda

- Introductions
- Barrett Law process

- Costs, proposed funding options
- Design discussion
- Questions/Answers

EXHIBIT C

City of Indianapolis
Bart Peterson. Mayor
[letterhead]

MEETING NOTICE
Indianapolis Department of Public Works
604 North Sherman Drive
Indianapolis. Indiana 46201

May 31. 2002

RE: Brisbane/Manning Barrett Law Sanitary Sewers Project BL-17-042

The Department of Public Works (DPW) of the City of Indianapolis has scheduled a public information meeting to present the final design plans and construction schedule for the installation of sanitary sewers in your neighborhood. *Although you may see equipment and materials for this project in your neighborhood prior to this meeting, we are still interested in your input regarding specific details of construction.*

The meeting will be held at 6:30 p.m. Wednesday, June 12, 2002, in the Fellowship Hall of St. Andrew's Presbyterian Church, 3535 Kessler Boulevard, North Drive.

At the meeting. property owners will have an opportunity to meet with representatives from DPW. the construction contractor and the inspection firm. **Please make every effort to attend this**

important meeting so that any questions you have can be answered.

This project was approved for construction by the Board of Public Works at the First Public Hearing. At the hearing the Board determined that the benefits accruing to the lots and parcels liable for assessment are equal to or greater than the estimated costs of the project. The Board also approved an estimated assessment range of $10,500 to $11,500 per buildable lot. The actual assessment rate will be set at a Final Public Hearing held after the completion of construction.

If you are unable to attend the meeting, but would like copies of the handouts, please call the Barrett Law Program Office after June 13th and request a packet.

See you on the 12th at St. Andrew's!

All DPW meeting locations are accessible to the disabled. If special accommodations are needed please contact the Indianapolis Department of Public Works, Public Information Office, 2360 City County Building, 200 East Washington Street, Indianapolis, Indiana 46204-3357, phone: 327-4700, TDD: 327-5186.

EXHIBIT D

Brisbane/Manning Barrett Law Sanitary Sewer Project BL-17-042
Construction Public Information Meeting
June 12, 2002
St. Andrew's Presbyterian Church

DPW Project Manager	Sandy Shafer, sshafer@IndyGov.org 327-4546
Construction Inspection CMID. Inc.	Brian Brownlee, Resident Project Representative 281-2917 (mobile phone); 562-0515 (office) Guy E. Della Valle, Project Manager, gdellavalle@cmidinc.com 445-8653 (mobile); 562-0515 (office)
Construction Contractor Weitzel Construction Co.	Jason Weitzel, jw11873@aol.com, 547-4000 (office) Jerry Templeton. 547-4000 (office)
DPW Barrett Law Program	Pegg Warnick, pwarnick@IndyGov.org 327-8314

Tonight's agenda:

Introductions
Post-construction process
- **Final walk through**
- **Final public hearing**
- **Barrett assessment**
- **Lateral installation**

Construction timetable
Question/answer period

EXHIBIT E

October 3. 2003

RE: Brisbane/Manning Barrett Law Sanitary Sewer Project

Dear Property Owner:

The City of Indianapolis has nearly completed the project to extend sanitary sewers to your property. It is the policy of the Department of Public Works that we provide property owners the opportunity to discuss any remaining concerns with the project team. This letter is notification of your opportunity to do this.

The project team, which includes City staff and members of the inspection and construction firms. has scheduled a final walk-through **from 8 to 11 a.m. and from 3 to 6 p.m. Monday and Tuesday, October 20 and 21, 2003**. The purpose will be to discuss any concerns about this project. particularly the restoration of your property after the installation of the new sanitary sewer line. **If you would like to schedule a 15-minute appointment with the team on that day, please contact Ms. Carol McAdams at 327-8441 to schedule that appointment**. We will then meet with you at your property to look first-hand at your concerns. *Following the final walk-through, all property owners in the project will be allowed to connect to the new sewer.*

If you cannot meet at those times but have construction-related concerns you believe need to be

addressed, please put those concerns in writing and mail **by October 15, 2003,** (to the address listed below) or fax them to Ms. Sandy Shafer, Senior Project Manager, at 327-8480.

Once the outstanding concerns have been resolved, the Final Public Hearing will be scheduled. You will be notified of the time, date and location of the Hearing. At that Hearing, the Board of Public Works will accept the new sewer and set the final assessment.

Sincerely,

Pegg Warnick
Barrett Law Senior Project Manager

cc: Sandy Shafer, Senior Project Manager
Brian Brownlee, CMID
Jeffrey Weitzel, Weitzel Construction Co., Inc.
DMD Permits Office
Project file (Brisbane/Manning)

EXHIBIT F

MEMORANDUM

TO	The Board of Public Works
FROM	Pegg Warnick, Barrett Law Senior Project Manager
DATE	June 9, 2004
RE	Final Public Hearing Brisbane/Manning Barrett Law Sanitary Sewer Project BL-17-042

RECOMMENDATIONS

After all interested persons have been heard, staff recommends that a Board member make the following motion:

"All persons having been heard, I move that

- "The Board of Public Works accept the project constructed as Public Improvement Resolution BL-17-042, Brisbane/Manning Barrett Law Sanitary Sewers Project,
- Confirm the Final Assessment Roll and transmit the roll to the Office of City Controller,
- Approve the final assessment amount of $9,278.00 per platted lot, and

- Accept the recommendation of the Controller's Office that the interest rate for this project be set at 3 ½ percent."

DISCUSSION

Notice of this hearing was published in both the *Indianapolis Star* and the *Court & Commercial Record* in the May 28, 2004 issues. The Public Improvement Resolution BL-17-042 was adopted by the Board of Public Works on August 8, 2001. At the First Public Hearing, held February 27, 2002, the total costs for this project were estimated to be $2,393,802.00. At that time, the project had 180 assessments and the Board set a targeted assessment of $10,500 to $11,500 per platted lot.

The construction of the project was awarded to Weitzel Construction Co. and CMID was selected as the inspection firm. Now that construction has been completed, the final costs for the project (including scoping report, design, construction and inspection) is $2,052,836.68. These costs represent a savings of $340,965.32 from the engineer's estimate over the actual project costs.

There were four properties in this project area that were connected to a sanitary sewer line that did not meet City standards. At its December 11, 2002 meeting, the Board of Public Works determined that these four properties should be included in the project and each would receive one-half an assessment.

In addition, the Board at its August 28, 2002 meeting, determined that two other properties (3399 Manning Rd. and 4270 Melbourne Rd., East Dr.) would be allowed to connect into the 42nd/Kessler Barrett Law project. In an agreement signed by all parties, it was agreed that the properties would remain on the Brisbane/Manning assessment roll and each receive one assessment, less the cost for a lateral stub-out. For the 3399 Manning Road property, the assessment would be reduced by $1,150.00; for the Melbourne address, the assessment would be reduced by $1,449.00. While neither property would be assessed on the 42nd/Kessler project, each property owner would be responsible for payment of the lateral. For the Manning Road property, the charge would be $1,150.00; for Melbourne, the cost would be $1,449.00.

The sales history of properties in this project area range from $120,000 to $270,000. Staff recommends the assessment be set at $9,278.00 per platted lot.

Item	Project Costs	Property Owners Contribution	City Contribution
Recommended assessment per platted lot	$9,278.00		
Number of assessments	180 @ $9,278.00 4 @ $4,639.00 1 @ $8,128 ($9,278 less $1,150.00) 1 @ $7,829 ($9,278 less $1,449.00)	$1,704,553.00	$294.68
Design fee	$188,149.00		$188,149.00
Scoping report	$10,000.00		$10,000.00
Construction costs	$1,704,847.68		
Inspection fee	$149,840.00		$149,840.00
TOTAL	**$2,052,836.68**	$1,704,553.00	$348,283.68

cc: Sandy Shafer, Senior Project Manager, Construction
Jeff Weitzel, Weitzel Construction Co.
Guy E. Della Valle, CMID
Lisa Kaufman, Marion County Health and Hospital Corporation
Adonna White, Barrett Law Assessment Bureau
Project file (Brisbane/Manning)

EXHIBIT G

May 14, 2004

RE: Brisbane/Manning Barrett Law Sanitary Sewer Project BL-17-042

Dear Property Owner:

The Board of Public Works has scheduled a Final Public Hearing to close out the Brisbane/Manning Barrett Law sanitary sewer project. The hearing has been scheduled for 2 p.m. Wednesday, June 9, 2004, in the Public Assembly Room (#230) in the City-County Building. The City-County Building is located at 200 E. Washington St.

The hearing allows property owners to voice any concerns with the project to the Board. If you are interested in addressing the Board, you will be asked to sign in and will then be called upon to speak. Please be advised that the meeting is televised. Once everyone has been given an opportunity to speak, the Board will close the hearing and then vote on the acceptance of the project and set the final assessment amount. At the First Public Hearing, the Board set the targeted assessment at $10,500 to $11,500 per platted lot.

If you are unable to attend the hearing, but would like for your comments to be made known to the Board, enclosed is a comment sheet for you to fill out. Either mail back to me (fold it, put a stamp on it and send it) or fax it to me at 327-4965 **by Thursday, June 3, 2004**.

Following the meeting, you will receive notice from the Barrett Law Assessment Bureau of the amount due and your options for payment will be explained. You will also receive a notice from Marion County Health & Hospital stating that you have six months to connect to the sanitary sewer line. The City began allowing property owners to connect to the new sewer in October 2003, following the project's final walk through.

Please contact me at 327-8314, or by e-mail at pwarnick@indygov.org with any questions.

Sincerely,

Pegg Warnick
Barrett Law Senior Project Manager

cc: Adonna White, Barrett Law Assessment Bureau
Project file (Brisbane/Manning)

EXHIBIT H

BOARD OF PUBLIC WORKS
RESOLUTION NO. 101, 2005

A RESOLUTION FORGIVING BARRETT LAW ASSESSMENTS

WHEREAS, The Board of Public Works (Board) is authorized by Indiana Code (IC) 36-9-39 to administer 'Barrett Law Funding for Municipal Sewer' program under which the Board approves all Barrett Law projects within the City of Indianapolis – Marion County, including individual assessment amount per parcel, and

WHEREAS, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems, and

WHEREAS, The Department of Public Works (DPW) has a proposed rate and fee increase package to the City-County Council for approval to continue to address the re-capitalization, expansion, operation and maintenance, and regulatory requirements of the City's sanitary sewer system which was approved by the City-County Council on October 31, 2005 (Proposal No. 535 as amended) effective on January 1, 2006, and

WHEREAS, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis – Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

NOW, THEREFORE, BE IT RESOLVED that the Board of Public Works hereby forgive all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005 forward to the Department of Public Works via the Barrett Law Assessment Bureau.

ADOPTED this 7th day of December, 2005.

Board of Public Works

/s/
James A. Garrard, Chairperson

/s/
Kip Tew, Member

/s/
Roger Brown, Member

/s/
Gregory Taylor, Member

/s/
Sue Schalk, Member

ATTEST: /s/
Kimberly Frye, Board Secretary

APPROVED AS TO FORM AND LEGALITY:

/s/
R. Matt Senseny, Board Counsel
Assistant Corporation Counsel

EXHIBIT I

STATE OF INDIANA	)	IN THE MARION
	)SS:	SUPERIOR COURT
COUNTY OF MARION	)	
	)	CAUSE NO. 49D11-0706-CT-026050
	)	

CHRISTINE ARMOUR, et al.,

Plaintiffs,

v.

CITY OF INDIANAPOLIS, et al.,

Defendants.

AFFIDAVIT OF JAMES A. GARRARD

I, James A. Garrard, under penalties of perjury state as follows:

1. I am over eighteen (18) years of age and competent to testify.

2. I have personal knowledge of the matters set forth in this Affidavit.

3. From January 1, 2004, until May 2006 I was Director of the Department of Public Works for the Consolidated City of Indianapolis.

4. In my capacity as Director, I made the policy decision to recommend to the Board of Works for the Consolidated City of Indianapolis (hereinafter "Board") replacement of the Barrett Law method of

financing sewer connections with the Septic Tank Elimination Program (STEP) program.

5. The STEP program simplified utility planning, financing and operations by assessing a flat rate per sewer connection, whereas the Barrett Law program required assessment of fees based on each individual's use.

6. In my capacity as Director, I made the policy decision to recommend to the Board to eliminate all balances remaining on accounts where a minimum of one (1) payment was made and that account had been connected to the sewer.

7. The decision to eliminate the Barrett Law method of financing and forgive money owed on or about November 1, 2005, was made for several reasons, including but not limited to the following:

a. The Board determined that the continued use of the Barrett Law funding system may present financial hardships on many middle to lower-income participants who most needed sanitary sewer service in lieu of failing septic systems;

b. The Board enacted the Septic Tank Elimination Program (STEP) based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection;

c. The City would no longer use Barrett Law statute Indiana Code section 36-9-39-15 for funding of the installation project. consequently the provisions of that statute were inapplicable. and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and defeat the purpose of the flat-rate per connection – namely simplifying things.

8. I believe that these goals were accomplished by the Board passing Resolution No. 101, 2005.

AND FURTHER AFFIANT SAYETH NOT.

I, James A. Garrard, under the penalties of perjury, affirm that I have read the Affidavit and that the foregoing representations are true to the best of my knowledge and belief.

DATED this 29th day of May, 2008.

/s/
James A. Garrard

STATE OF INDIANA	)	IN THE MARION
	)SS:	SUPERIOR COURT
COUNTY OF MARION	)	CAUSE NO. 49D11-0706-CT-026050

CHRISTINE ARMOUR, DAVID A. BIRD. ALVERA C. BUKER, JOSEPH and ROZZETTA CUMBERLANDER, ALICE J. DETZLER (Dickson F. Detzler, deceased), JAMES and RENATE DONAHUE. KENNETH J. and MARY JANE EILER, SANDRA KAY HEVRON, Personal Representative of the Estate of Ruth Virginia Enmeier, DAVID A. and HEATHER R. FELLABAUM, NANCY LEE GAHL, DAVID M. GIBSON, Trustee of the Margaret Lochart Gibson Trust, INGEBORG HAESLOOP, Executrix of the Estate of Robert E. Haesloop, ROBERT E. and JUNE E. HOLT, FRANK S. and JEANNE A. JOHNSON, EDWARD J. AND ERIKA M. KELLY, LEONARD and COLLEEN E. KIRKSEY, CARLOS O. and KATRINA V. KREAMER, FRANK P., JR. and BETTYE JO LLOYD, WILLIAM H., JR. and SUE ELLEN MAIN, WILMA M. MARLEY, GEOFFREY H. and

FILED
86
May 29 2008
Elizabeth L. White
CLERK OF THE
MARION CIRCUIT
COURT

DINAH J. MICHELS, NORMA JEAN MORGAN, ZORA NATHAN (Harry Nathan, deceased), FRANK D. and SHARON L. NEESE, DONNIS D. PATTON, VIESTRUS M. and CAROLYN PURVLICIS, SUSAN MOE, Co-Executrix of the Estate of Margaret Rosemary Richard, M. EVELYN ROGERS, MRS. CLIFFORD A. SHORT, LOUIS J. JR. and LINDA J. URBANCIC and MARY B. WILLIAMS,

Plaintiffs,

v.

THE CITY OF INDIANAPOLIS, BART PETERSON, Mayor of the City of Indianapolis, INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, INDIANA BOARD OF PUBLIC WORKS, ROBERT J. CLIFFORD, Controller of the City of Indianapolis, INDIANAPOLIS OFFICE OF FINANCE AND MANAGEMENT and BILLIE J. BREAUX, Marion County Auditor,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * *

The City of Indianapolis enacted Board of Public Works Resolution Number 101, 2005. which provided in part that the Board of Public Works forgive all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005, forward to the Department of Public Works via the Barrett Law Assessment Bureau. *Plaintiffs' Complaint* ¶ 12.

On December 7, 2005, the Indianapolis Board of Public Works ("Board") passed Resolution No. 101, 2005 which in part forgave all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program for amounts due and owing after the date of November 1, 2005. *Resolution No. 101, 2005, Defendants' Exhibit H.* The purpose of this policy decision stemmed from multiple reasons:

a. The Board determined that the continued use of the Barrett ,Law funding system may present financial hardships on many middle to lower-income participants who most needed

sanitary sewer service in lieu of failing septic systems;

b. The Board enacted the Septic Tank Elimination Program (STEP) based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection;

c. The City would no longer use Barrett Law statute Indiana Code section 36-9-39-15 for funding of the installation project, consequently the provisions of that statute were inapplicable, and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and defeat the purpose of the flat-rate per connection – namely simplifying things.

Affidavit of Jim Garrard, Exhibit I.

On July 22, 2007, Plaintiffs filed their Complaint with this court requesting refunds

equivalent to the forgiveness amount granted under Board of Public Works Resolution Number 101, 2005 for the project in which their residence is included. Plaintiffs did not comply with the appropriate statutory requirements in order to request refunds, there is no evidence that homeowners filed a written remonstrance during the Board's decision making process for the assessment on June 9, 2004 or on December 7, 2005 when the Board decided to forgive the unpaid assessments. Moreover, the homeowners did not file a complaint within 30 days of either one of the Board's actions.

ARGUMENT

A. Standard of Summary Judgment.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Havens v. Richey*, 582 N.E.2d 792, 795 (Ind. 1991); *Cowe by Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 633 (Ind. 1991). A fact is "material" if its existence facilitates the resolution of any issues involved in the lawsuit. *Kerr v. Carlos*, 582 N.E.2d 860, 863 (Ind.Ct.App. 1991); *Funk v. Funk*, 563 N.E.2d 127, 129 (Ind. Ct. App. 1990), *trans. den.* A defendant is entitled to summary judgment when it can demonstrate either that the undisputed material facts negate at least one element of the plaintiff's claim or that a valid affirmative defense bars the plaintiff's claim. *Hawn v. Padgett*, 598 N.E.2d 630, 632 (Ind. Ct. App. 1992). Mere assertions, opinions or conclusions of law will not suffice to create genuine issue of material fact sufficient to preclude

summary judgment. *Sanchez v. Hamara*. 534 N.E.2d 756, 759 (Ind. Ct. App. 1989); *McMahan v. Snap On Tool Corp*. 478 N.E.2d 116, 119 (Ind. Ct. App. 1985).

B. Plaintiffs' 14th Amendment Equal Protection Clause argument fails as a matter of law for a rational basis exist for the Defendants' decision.

Plaintiffs argue that Resolution Number 101, 2005 arbitrarily classifies homeowners into 2 categories in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution: (1) those who paid taxes promptly, and (2) those who did not. Relying on various state supreme court decisions from California, Minnesota, Florida and Ohio, Plaintiffs argue that this type of classification has no reasonable basis. The U.S. Supreme Court unanimously disagrees, therefore Plaintiffs' claims fail.

Under the Equal Protection Clause of the U.S. Constitution's 14th Amendment, the court must first determine which standard of scrutiny applies. In this case, the law in question does not distinguish on the basis of race or gender, it does not distinguish between in-state or out-of-state businesses, nor does it favor longtime residents over new residents. As a result, the rational basis test is applied. *Michael Fitzgerald, Treasurer of Iowa, v. Racing Association of Central Iowa, et al.*, 539 U.S. 103 (2003).

The rational basis test gives great deference to policymakers of complex tax schemes. In *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992), the U.S. Supreme

Court held that in general the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. *See also U. S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174 (1980); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985). This standard is especially deferential in the context of classifications made by complex tax laws: "In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Williams v. Vermont*, 472 U.S. 14, 22 (1985), *quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

In 2003, the U.S. Supreme Court unanimously reversed the Iowa Supreme Court's ruling that a tax scheme producing different tax rates for different classes to rescue racetracks from economic distress created by an Iowa statute violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. *Fitzgerald, supra.* In *Fitzgerald*, the U.S. Supreme Court gave great deference to the policymakers in holding that there was no Equal

Protection Clause violation because the objective of the legislation. The Iowa policymakers in *Fitzgerald* enacted a statute to "rescue racetracks from economic distress, while containing subsidiary provisions that sought to achieve other desirable (perhaps even contrary) ends as well, thereby producing a law that balanced objectives but still served the general objective when seen as a whole." *Fitzgerald*, 539 U.S. at 107. A challenge to the statute under the 14th Amendment's Equal Protection Clause ensued. The Iowa Supreme Court found that the legislation in *Fitzgerald* failed to meet the rational basis standard because it failed to further the stated objective which was rescuing the racetracks from economic distress. The U.S. Supreme Court disagreed.

In unanimously reversing the Iowa Supreme Court, the U.S. Supreme Court recognized the deference given to decisionmakers in creating taxing schemes. The Court announced that "the Constitution grants [policy decisionmakers], not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide. 'The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* at 104. The Court found that the policy reasons to impose different rates was rationally related to the distinction.

Here, this case is similar to *Fitzgerald*. The policy reasons are plenty:

a. The Board determined that the continued use of the Barrett Law funding system may present financial hardships on many middle to lower-income participants who most needed sanitary sewer service in lieu of failing septic systems;

b. The Board enacted the Septic Tank Elimination Program (STEP) based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection;

c. The City would no longer use Barrett Law statute Indiana Code section 36-9-39-15 for funding of the installation project, consequently the provisions of that statute were inapplicable, and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the

> transition to the STEP program would not benefit the taxpayers and defeat the purpose of the flat-rate per connection – namely simplifying things.

Affidavit of Jim Garrard, Exhibit I. The decision to eliminate balances of all individuals who have made a minimum of one payment and have been connected to the City's sewer system not only does not distinguish between landowners, but even if such distinction exists, and it does not, it is for the purpose of accomplishing these goals. Resolution Number 101, 2005 accomplished these objectives. *Id.* ¶ 8. Therefore, the passage of Resolution Number 101, 2005 was rationally related to a purpose to reduce administrative costs to the City, reduce financial hardships on residents, improve the City's ability to budget projects appropriately, and establish closure to the Barrett Law program, purposes that should be applauded. Since great deference is given to decisionmakers in passing taxing schemes, summary judgment against Plaintiffs on their Equal Protection claims is proper.

* * *

IN THE COURT OF APPEALS OF INDIANA

STATE OF INDIANA	)	IN THE MARION
	)SS:	COUNTY SUPERIOR
COUNTY OF MARION	)	COURT
	)	
	)	CIVIL COURT
	)	ELEVEN ROOM 1421
	)	CAUSE NUMBER
	)	49D11-0706-CT-026050

CHRISTINE ARMOUR, DAVID A. BIRD, ALVERA C. BUKER, JOSEPH and ROZZETTA CUMBERLANDER, ALICE J. DETZLER (Dickson F. Detzler, deceased), JAMES and RENATE DONAHUE, KENNETH J. and MARY JANE EILER, SANDRA KAY HEVRON. Personal Representative of the Estate of Ruth Virginia Enmeier, DAVID A. and HEATHER R. FELLABAUM, NANCY LEE GAHL, DAVID M. GIBSON, Trustee of the Margaret Lochart Gibson Trust, INGEBORG HAESLOOP, Executrix of the Estate of Robert E. Haesloop, ROBERT E. And JUNE E. HOLT, FRANK S. and JEANNE A. JOHNSON, EDWARD J. AND ERIKA M. KELLY, LEONARD and COLLEEN E. KIRKSEY, CARLOS O. and KATRINA V. KREAMER, FRANK P., JR. and BETTYE JO	)

LLOYD, WILLIAM H., JR. and SUE ELLEN MAIN, WILMA M. MARLEY, GEOFFREY H. and DINAH J. MICHELS, NORMA JEAN MORGAN, ZORA NATHAN (Harry Nathan, Deceased), FRANK D. and SHARON L. NEESE, DONNIS D. PATTON, VIESTRUS M. and CAROLYN PURVLICIS, MOE, Co-Executrix of the Estate of Margaret Rosemary Richard, M. EVELYN ROGERS, MRS. CLIFFORD A. SHORT, LOUIS J. JR. and LINDA J. URBANCIC And MARY B. WILLIAMS,	)
Plaintiffs,	)
THE CITY OF INDIANAPOLIS, BART PETERSON, Mayor of the City of Indianapolis, INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, ROBERT J. CLIFFORD, Controller of the City of Indianapolis, INDIANAPOLIS OFFICE OF FINANCE And MANAGEMENT and BILLIE J. BREAUX, Marion County Auditor,	)
Defendants.	)

TRANSCRIPT OF CROSS MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE
JUDGE JOHN F. HANLEY

SEPTEMBER 29, 2009

APPEARANCES

Ronald J. Waicukauski, Esq.
R. Davy Eaglesfield, III
PRICE WAICUKAUSKI & RILEY, LLC
The Hammond Block Building
301 Massachusetts Avenue
Indianapolis, IN 46204

Jonathan L. Mayes, Esq.
Chief Litigation Counsel
Office of Corporation Counsel
200 East Washington Street, Suite 1601
Indianapolis, IN 46204

Janice L Worth, Official Court Reporter
Marion Superior Court
Civil Division Room 1421

* * *

[7] THE COURT: We're on the record in Cause Number 49D11-0706-CT-026050; Christine Armour, et al versus The City of Indianapolis, et al. Would counsel identify themselves for the record please?

MR. WAICUKAUSKI: Your Honor, for the Plaintiffs, I'm Ron Waicukauski and along with me is Davy Eaglesfield.

MR. MAYES: Your Honor, Jon Mayes for The City of Indianapolis.

THE COURT: This matter was set for hearing today on each parties Motion for Summary Judgment; is that correct?

MR. WAICUKAUSKI: That is correct, Your Honor.

MR. MAYES: Yes.

* * *

[17] THE COURT: Mr. Mayes.

MR. MAYES: Your Honor, this is a case involving a tax increase and on Page 14 of their brief, Plaintiffs talk about the phrase or word taxation and U.S. Constitution includes assessment and collection as found in this Barrett Law, statutory scheme and the related ordinances and decisions by municipalities.

The City of Indianapolis doesn't disagree, we agree with that assessment; that this is a taxing case. They're alleging that the City by a legislative enactment of the City County Council, the City Administration acting pursuant to that drew lines among citizens in Marion County and in drawing those lines created classifications and by doing so a de facto violation of the Equal Protection Clause of the 14th Amendment results.

This is a taxing scheme as I've said. Just like an income tax scheme, just like property tax scheme, sales tax, and payroll tax. In all of those schemes lines are drawn. Classifications are created. Both on the front end of who to tax and how much to tax and on the back end as far as refunds. We are in the mist of a Presidential Election where one candidate says: if you make above a certain amount you're going to get taxed more and if you make below a certain amount you're going to get taxed more. Another candidate [18] says: if you make above a certain amount you're going to get taxed less. Classifications Your Honor, classifications for purposes of taxation.

And yet oddly enough there are no constitutional challenges to these. You don't hear of wide spread challenges to constitutionality of taxing schemes under the 14th Amendment. The reason why its because the U.S. Supreme Court has unequivocally unanimously and long held that discretion as the Plaintiffs recognized rests with the legislative body; the duly elected representative of those citizens.

Here we have Plaintiffs relying on some State Supreme Court cases for their position. They have today relied principally on ***HOESTETTER*** case out of Ohio in 1937; Ohio Supreme Court case, that case interrupted an Ohio State Supreme Court provision. It did not interrupt the 14th Amendment to the U.S. Constitution. They also rely on, as they said most principally the Minnesota case, ***State ex. Rel. Matteson v. Luecke***, Minnesota, 1935. Minnesota Supreme Court, again, a Minnesota State

Constitutional provision. No equal protection challenge there under the 14th Amendment. These cases are wholly irrelevant and offer nothing to this case. What we have said in our response is that the 2003 unanimous U.S. Supreme Court case interrupting the 14th Amendment is applicable here. The ***Fitzgerald*** case, Your Honor, Justice Brier speaking for a unanimous Supreme Court in 2003 said that broad discretion in interrupting taxing schemes rest with legislative and state legislative and of course municipal legislative bodies. And there's a good reason why. That is because the legislative branch in enacting taxing schemes is the best branch to be able to hear what the public want and respond to that.

[19] Taxation without representation obviously was the cries of our republican our democracy early on. The Supreme Court, the U.S. Supreme Court in interrupting the 14th Amendment the Equal Protection Clause has stated that broad discretion rests with those legislative branches. Here, it's no different. We have the City of Indianapolis by its duly erected, elected representatives, the City County Council, stating that the entire scheme for Sanitation Sewers needs to be redone. They did that in the ordinance as the Plaintiffs recognized. And then in that same ordinance they gave the power to the Board of Works, to the City to come up with how to go about that. The City took a look at that and made a very difficult decision, Your Honor, on where to draw that line. That line was drawn because of several different reasons that we provided in the affidavit of Jim Gerard, the former DPW Director. The reasons

are plenty here; first of all; the board determined that continued use of the Barrett Law funding system may present financial hardships on many middle to lower income participants who most need sanitary sewer system in lieu of failing septic systems.

We had failing septic systems out there, Your Honor, there's people that need to have connection to the sewer lines. They couldn't afford it and this line was drawn for that reason. The board enacted the Septic Tank Elimination Program, STEP program that we heard about based on several interrelated financial engineering public health and geographical factors. This decision, this line was drawn. So that all future installations projects would cost one flat rate per connection; twenty five hundred dollar fee. City would no longer use Barrett Law and instead transition over to STEP program. And the administrative cost, Your Honor, of servicing processing the remaining [20] balances under Barrett Law during the transition time as Plaintiffs stated that some people elected ten years, twenty years, thirty years; the cost to the City in processing those over the ten, twenty and thirty year life of those balances weighed against drawing the line to include those. The City looked at that, the City weighed those; made a very difficult decision and drew that line.

Your Honor, what we have here is the Plaintiffs questioning the affidavit by DPW Director, Jim Gerard. What we don't have is evidence to the contrary. It is unconverted that these were the policy reasons behind that. And it is unconverted

that DPW Director Jim Gerard believed that the ordinance and the resolution by the Board of Works accomplished that.

* * *

PETITIONER'S BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Writ Of Certiorari
To The Indiana Supreme Court

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Petitioners are the owners of 31 residential real estate parcels in Indianapolis, Indiana, who were assessed $9,278 each for connection to a public sewer system. Petitioners paid their assessments in full, while their neighbors—owners of approximately 150 other parcels—elected to pay in monthly installments over 10, 20, or 30 years. Just one year later, the City forgave the outstanding balances of those taxpayers who were paying in installments, but it refused to refund any portion of the payments made by those who had paid in full.

The Indiana Supreme Court held that this refusal did not violate the Equal Protection Clause, even though it allowed the City to retain from petitioners 10 to 30 times as much in taxes as identically situated owners paid. In so holding, the 3-2 majority of the Indiana Supreme Court dismissed this Court's unanimous decision in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), as "narrowed to its facts." Pet. App. 28a. The question presented is:

> Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

RULE 14.1(B) STATEMENT

Petitioners are Christine Armour; David A. Bird; Alvera C. Buker; Joseph and Rozzetta Cumberland; Alice J. Detzler; James and Renate Donahue; Kenneth J. and Mary Jane Eiler; Sandra Kay Hevron; David A. and Heather R. Fellabaum; Nancy Lee Gahl; David M. Gibson; Ingeborg Haesloop; Robert and June Holt; Frank and Jeanne A. Johnson; Edward J. and Ericka M. Kelly; Leonard and Colleen Kirksey; Carlos and Katrina Kreamer; Frank and Bettye Jo Lloyd; William H. and Sue Ellen Main, Jr.; Wilma Marley; Geoffrey and Dinah Michels; Norma Jean and Paul Morgan; Zora Nathan; Frank and Sharon Neese; Donnie Patton; Viesturs and Carolyn Purvlicis; Susan Moe; Evelyn Rogers; Clifford Short; Louis and Linda Urbancic; and Mary Williams.

Respondents are the City of Indianapolis; Gregory A. Ballard, Mayor of the City of Indianapolis; Indianapolis Department of Public Works; Indianapolis Board of Public Works; Jeffrey L. Spalding, Controller of the City of Indianapolis; Indianapolis Office of Finance and Management; and Billie J. Breaux, Marion County Auditor.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Indiana Supreme Court (Pet. App. 1a-39a) is reported at 946 N.E.2d 553. The opinion of the Indiana Supreme Court granting transfer of the decision of the Court of Appeals of Indiana (Pet. App. 40a) is reported at 940 N.E.2d 821. The opinion of the Court of Appeals of Indiana (Pet. App. 41a-78a) is reported at 918 N.E.2d 401. The order of the Marion Superior Court granting summary judgment for petitioners (Pet. App. 80a-81a) is unreported.

JURISDICTION

The judgment of the Indiana Supreme Court was entered on May 10, 2011. The petition for a writ of certiorari was filed on August 8, 2011, and granted on November 14, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION, STATUTE, AND ORDINANCES INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

Relevant portions of Resolution 101 of the Indianapolis Board of Public Works; General Ordinance No. 107 of the City-County Council of Indianapolis-Marion County; and Indiana's Barrett Law, Ind. Code §§ 36-9-37, -39, are reproduced in the appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

When the City of Indianapolis needed to fund the expansion of its municipal sewer system to serve a portion of the Northern Estates neighborhood, it invoked an Indiana statute that authorized it to impose a special tax assessment on the owners of the affected homes. That law required that the costs of the sewer project be "apportioned equally." Ind. Code § 36-9-39-15(b)(3). Accordingly, each of the approximately 180 affected parcels was issued a tax bill for $9,278. Petitioners paid their assessments in full. Other homeowners elected to pay in monthly installments over 10, 20, or 30 years.

Just one year later, the City announced that it would not use this unpopular funding scheme for future projects. It then ordered the forgiveness of all outstanding balances under the old funding scheme, including the balances of the Northern Estates homeowners who had elected to pay in installments. The City refused, however, to refund any portion of the full payments petitioners had made. As a result, petitioners paid between 10 and 30 times more than their next-door neighbors. The question here is whether the City's refusal to issue any refund to petitioners violated the Equal Protection Clause's requirement of "a rough equality in tax treatment of similarly situated property owners." *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 343 (1989).

A. The Brisbane/Manning Sewer Project And The Barrett Law

1. Northern Estates is a middle-class neighborhood of approximately 550 homes just northwest

of downtown Indianapolis.[1] In 2002, the City approved a plan to connect approximately 180 of those parcels to the municipal sewer system, replacing the individual septic system that each home used. JA59. The project was known as the Brisbane/Manning Barrett Law Sanitary Sewers Project. *Ibid.* "Brisbane/Manning" referred to the street intersection around which the affected homes were clustered; "Barrett Law" referred to the statutory mechanism for paying for the project.

2. The Barrett Law is an Indiana statute that authorizes municipalities to finance sewer projects by assessing taxes directly against the owners of properties benefiting from a particular project. Ind. Code § 36-9-39 *et seq.* The Barrett Law requires that "[t]he costs shall be primarily apportioned *equally* among all abutting lands or lots." *Id.* § 36-9-39-15(b)(3) (emphasis added).

The Barrett Law provides that "adjustments" to those assessments may "be made as provided by section 16 of this chapter." Ind. Code § 36-9-39-15(b)(3). Section 16, in turn, provides methods for calculating the number of lots by which a project's costs are to be equally divided. Section 17 allows for an adjustment to an individual assessment if (1) the parcel abuts

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[1] The neighborhood was originally developed in the 1960s. In 2004—before the recent downturn in the housing market—home sale prices ranged from $120,000 to $270,000. JA67. The 2000 Census reported that the median household income in Washington Township, in which the Northern Estates neighborhood is located, was $47,079 and that 23% of township residents collect Social Security income. See U.S. Census Bureau, *Profile of General Demographic Characteristics: 2000*, http://censtats.census.gov/data/IN/0601809780792.pdf

another street or alley and "has already been assessed for sewage works"; (2) the parcel "cannot be reasonably connected with or served by the sewage works"; (3) the sewer project "does not confer benefit on the property"; or (4) the actual benefit "conferred by the sewage works is less than the" amount of the assessment. *Id.* § 36-9-39-17. Any adjustments made under that section must then be absorbed equally by "all the other property assessable for the sewage works" or "assessed against the municipality." *Id.* § 36-9-39-17(c).

Once the roll of assessments is prepared, those numbers "are final and absolute unless changed under sections 23 and 24 of this chapter." Ind. Code § 36-9-39-22(a). Those sections allow property owners to challenge the authority's determination that one or more parcels are "specially benefited in the amounts respectively assessed." *Id.* § 36-9-39-23(b). Any alteration to the assessment "must be based on the works board's findings concerning the special benefits received on account of the sewage works." *Id.* § 36-9-39-23(c). That decision "is final and conclusive on all parties." *Id.* § 36-9-39-25(a).

The Barrett Law further provides for the collection and enforcement of these assessments. It declares that "the municipal fiscal officer *shall* collect and enforce the special assessments," Ind. Code § 36-9-37-4 (emphasis added), and that installment payments "*shall* be collected in the same manner as other taxes," *id.* § 36-9-37-6 (emphasis added). The statute contains no suggestion that taxpayers who elect to pay a Barrett Law assessment under an installment plan may be entitled to preferential treatment.

3. The City issued tax assessments to each of the owners of the approximately 180 properties to be connected in the Brisbane/Manning project. As required by the Barrett Law, the City equally divided the costs by the number of lots involved in the project and imposed an assessment of $9,278 on the owners of each parcel.[2]

Petitioners are owners of 31 of the 39 properties whose owners paid their assessments in full. Most of their neighbors elected to pay in monthly installments over a term of years: owners of 47 properties opted for the 10-year plan (paying $77.27 per month); 27 opted for the 20-year plan (paying $38.66 per month); and 68 opted for the 30-year plan (paying $25.77 per month). Pet. App. 4a.[3] As required by statute, those paying under an

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[2] Parcel 196, owned by petitioner Alvera C. Buker, was assessed only one-half of that amount, or $4,639, because her parcel had a preexisting municipal sewer hookup that did not meet current City standards. JA66-68; see Ind. Code § 36-9-39-17(b)(3) (authorizing reduction in assessment where benefit "conferred by the sewage works is less than" the amount otherwise to be assessed).

[3] This breakdown of installment payers is the same breakdown used by the court below. The precise number of installment and upfront payers may differ slightly from these figures because of a very small number of errors in determining the payment status of some homeowners. The court below stated that there were "approximately 180 parcels covered" by the Brisbane/Manning project. Pet. App. 4a. Nothing in this case turns on the precise number of parcels assessed under the Brisbane/Manning project or on the precise number of installment and upfront payers. This brief will therefore use the same figures relied on by the court below, both with respect to the "approximately" 180 total parcels and with respect to the number of payers under each of the three installment plans.

installment plan were charged interest, which the City set at 3.5% per year. *Ibid.*; see Ind. Code § 36-9-37-8.5(e). As also required by statute, each taxpayer electing an installment plan "enter[ed] into a written agreement stating that in consideration of that privilege [he or she] (1) will not make an objection to an illegality or irregularity regarding the assessment * * *; and (2) will pay the assessment as required by law with specified interest." *Id.* § 36-9-37-8.5(c).

B. The City Abandons The Barrett Law For Future Sewer Projects

The Barrett Law, which the City had used repeatedly to finance various projects over the years, was highly unpopular. See *Cox* v. *City of Indianapolis*, No. 09–435, 2010 WL 2484620, at *1 (S.D. Ind. June 14, 2010) ("No one liked [the] Barrett Law—not the City officials, not the neighborhood organizations, not the general public.") (internal quotation marks omitted). On October 31, 2005, the City announced that it would no longer use the Barrett Law to finance sewer expansion projects. It passed City-County Ordinance No. 107, which adopted the Septic Tank Elimination Program (STEP) to fund future projects. STEP imposed a lower price tag on residents: a $2,500 fee for each new connection to the sewer. To make up for reduced assessments, the City imposed an increased sewer usage fee on *all* residents connected to the municipal sewer system. App., *infra*, 23a-24a.

C. The City Forgives Outstanding Barrett Law Assessments But Refuses Refunds To Taxpayers Who Paid In Full

The City's Board of Public Works then decided to dispose of existing assessments under the Barrett Law. On December 7, 2005, the Board enacted Resolution No. 101, which "forg[a]ve all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005[,] forward." App., *infra*, 26a. Resolution 101 contained four "Whereas" clauses. The first recited the Board's taxing authority under the Barrett Law. *Id.* at 25a. The second declared that "[t]he Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." *Ibid.* The third explained that STEP had included a "rate and fee increase" sufficient to meet the City's needs. *Ibid.* The fourth stated that "[t]he financial model upon which [STEP] was based, considered the current assessments" under the Barrett Law and the need for future projects. *Id.* at 26a. Resolution 101 did not state a reason why only those Barrett Law assessments outstanding on November 1, 2005, would be forgiven.

The November 1 cutoff date meant that homeowners paying their Brisbane/Manning assessments in installments had made just one year's worth of payments. Those under the 10-year plan had each paid a total of $927.80 (10% of their assessment); those under the 20-year plan had each paid $463.90 (5%); and those under the 30-year plan had each paid

$309.27 (3⅓%). Because petitioners had all paid in full, they had no outstanding balances as of November 1 and thus received no relief under Resolution 101.

The effect of forcing petitioners (and others who did not elect an installment plan) to pay 100% of their assessments, while their neighbors paid 10, 5, or 3⅓%, was dramatic. Of the total amount of funds from Brisbane/Manning assessments that the City collected, the 39 properties that did not use an installment plan contributed roughly 80%, even though they constituted barely more than 20% of the assessed properties.[4]

Petitioners requested refunds from the City for the difference between the full amounts they paid and the amount actually paid by their neighbors who had elected installment plans. The City refused.

The Director of the Department of Public Works, James Garrard, sought to explain the City's decision. Garrard acknowledged that the Barrett Law required that "costs * * * shall be equally apportioned among the affected lots," and stated that "the City's intent is to treat property owners within

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[4] Owners of the 39 properties who had paid their assessment in full paid approximately $350,000 out of the roughly $430,000 collected. Although the precise ratio may vary slightly based on the total number and breakdown of parcels and other minor variations in amounts paid, see note 3, *supra*, it is clear that those who paid in full paid the vast majority of the assessments collected for the Brisbane/Manning project. A different perspective on the numbers makes the same point: The City refused petitioners' request for $273,391.63 in refunds while forgiving roughly $1,240,000 in assessments imposed on homeowners paying in installments.

each project area equitably, based upon the scope and value of each specific project." JA50. He continued, "[w]e recognize that the time frame would suggest to you that refunds are warranted." JA51 But he asserted that doing so would be unfair vis-à-vis "previous projects constructed" under the Barrett Law. *Ibid.* "Refunding payments made in your project area, or any portion of the payments," he stated, "would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments." *Ibid.*

Garrard's letter did not claim that the treatment of petitioners was fair in comparison to the thousands of dollars in relief granted to petitioners' neighbors, or that there was any difference among the homeowners other than their time of payment. To the contrary, Garrard acknowledged that the November 1, 2005, cutoff date "*might seem arbitrary to you*," but asserted (without further explanation) that "it is essential for the City to establish this date and move forward with the new funding approach." JA51 (emphasis added).

D. This Litigation

1. Petitioners filed this lawsuit in Marion Superior Court against the City and several of its officials. The lawsuit alleged, among other things, that respondents' refusal to issue any refund to petitioners while granting relief to their next-door neighbors violated the Equal Protection Clause of the U.S. Constitution. JA12-24. Both sides moved for summary judgment on that claim.

In support of the contention that its action survived rational-basis scrutiny, the City submitted

an affidavit signed by Mr. Garrard, who had "made the policy decision to recommend to the Board [of Public Works]" that it adopt Resolution 101. JA75. Garrard first explained why the City had abandoned the Barrett Law in favor of STEP:

a. The Board determined that the continued use of the Barrett Law funding system may present financial hardships on many middle to lower-income participants who most needed sanitary sewer service in lieu of failing septic systems;

b. The Board enacted the Septic Tank Elimination Program (STEP) based on several interrelated financial, engineering, public health and geographical factors so that all future installation projects would cost one flat rate per connection * * * .

JA75. Garrard then attempted to explain why the City had forgiven outstanding Barrett Law assessments as of November 1, 2005:

c. The City would no longer use Barrett Law statute Indiana Code section 36-9-39-15 for funding of the installation project, consequently the provisions of that statute were inapplicable, and it was essential for the City to establish a clear date for the change and move forward with the new funding approach; and

d. The administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and

> [would] defeat the purpose of the flat-rate per connection—namely simplifying things.

JA76. Like his earlier letter, Garrard's affidavit did not attempt to draw any distinction among Northern Estates homeowners—all that mattered to the City was whether a balance was outstanding on November 1, 2005.

After a hearing, the trial court granted summary judgment for petitioners, Pet. App. 80a-81a, and entered judgment in favor of the owners of each property for $8,965.73 (except Ms. Buker, who was awarded $4,329.73), for a total of $273,391.63, Pet. App. 83a-84a. The trial court also awarded attorneys' fees and expenses under 42 U.S.C. § 1988. Pet. App. 84a.

2. The Court of Appeals of Indiana unanimously affirmed. The court held that "the City's refusal to issue a refund to the Homeowners in an amount that would place them in rough equality with their similarly situated, and identically taxed, neighbors violated the Homeowners' right to equal protection of the laws." Pet. App. 43a. The "most relevant" case on point, the court explained, was this Court's unanimous decision in *Allegheny Pittsburgh*, which held that "'the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated owners.'" Pet. App. 57a, 58a (quoting 488 U.S. at 343) (alteration omitted). The fact that some taxpayers had not yet paid their tax in full, the court concluded, was not a legitimate basis for creating this gross inequality among Northern Estates homeowners.

The court rejected the City's contention that petitioners were "not similarly situated" to their neighbors who received relief under Resolution 101: "The City cannot avoid an equal protection claim by subdividing the class and, in effect, re-defining the class as those who 'carried no balances requiring continued administration by the City.'" Pet. App. 62a (quoting Aplts. Br. 10). The court also rejected the City's contention that petitioners had failed "'to show [that] they were similarly situated to the low-income families'" who benefited from the forgiveness of Barrett Law assessments. *Ibid.* "The unstated assumption behind the City's argument," the court explained, "is that only low-income property owners paid their Barrett Law assessments in installments and that only non-low-income property owners paid in full." Pet. App. 63a n.9. Since petitioners had established a "prima facie showing of disparate treatment," however, it was "the City's burden to rebut" that showing. *Ibid.* (citing *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008)). "[T]he City designated no evidence [on summary judgment] showing that the Homeowners did not include middle to lower income participants in the Northern Estates Barrett Law program." *Ibid.* (internal quotation marks omitted).

Turning to the reasons set forth in Resolution 101 itself, the court explained that, "when the text of a law 'specifically declare[s] [its] purpose, the [law leaves] no room to conceive of any other purpose for [its] existence.'" Pet. App. 65a (quoting *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530 (1959)). The court noted that the resolution "identifies only one rationale for the City's decision to forgive

outstanding Barrett Law assessments: the transition from Barrett Law funding to STEP is in the best interests of middle- to lower-income property owners." *Id.* at 66a. But that was beside the point—petitioners did "not challenge the City's decision to move from the Barrett Law to STEP." *Id.* at 66a-67a. The constitutionally relevant question was "whether the City can apportion costs equally among similarly situated property owners and then forgive outstanding assessments on an arbitrary date without refunding an equivalent amount to those property owners who had already paid the assessment in full." *Id.* at 67a. "[N]either the Resolution's findings nor its forgiveness provision address the City's decision[] not to issue a refund to [petitioners]." *Ibid.* To the contrary, "there is a remarkable disconnect between those two decisions." *Ibid.*

That disconnect, the court explained, led to "grossly disparate treatment" of petitioners, who "paid from ten to thirty times more than each of their similarly situated neighbors." Pet. App. 69a (citing *Allegheny Pittsburgh*, 488 U.S. at 344). That inequity violated petitioners' "legitimate expectation that all property owners subject to the same assessment would pay the same amount, either outright or in installments, and [petitioners] reasonably relied on the City's invitation to pay their assessments in full." *Id.* at 70a.

The court then examined the Garrard affidavit. As an initial matter, the court explained, it was improper under Indiana law to "impute Garrard's personal opinions, which are not expressed in the language of the Resolution, to the entire Board." Pet. App. 72a (citing *Utility Center, Inc.* v. *City of Fort*

Wayne, 868 N.E.2d 453, 459 (Ind. 2007)). In any event, Garrard's statements missed the mark. The professed desire to avoid "administrative costs" of continued collections made no sense, because "there is no evidence or suggestion" that those costs "would be greater than the amount collected," *id.* at 72a-73a, and, of course, no administrative costs would be incurred by refunding a portion of petitioners' fully paid assessments, *id.* at 73a. The court therefore concluded that the City's purported desire to save administrative costs was "not a plausible policy reason for the City's disparate treatment of the Homeowners." *Ibid.* (citing *Nordlinger* v. *Hahn*, 505 U.S. 1, 10-11 (1992), and *Allied Stores*, 358 U.S. at 530). Likewise, the asserted interest in "simplifying things" as the City transitioned to STEP was not "plausibly related to the City's refusal to issue a single refund to [petitioners]." *Id.* at 74a-75a.[5]

Finally, the court rejected the City's contention that the proper remedy for a constitutional violation was to rescind forgiveness rather than to order a refund to petitioners. The court explained that, as this Court had held in *Allegheny Pittsburgh*, the Equal Protection Clause "'is not satisfied if a State does not remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking upward revision of the taxes of other members of the class.'" Pet. App. 76a (quoting 488 U.S. at 346).

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[5] The court also held that the City had abandoned on appeal the justification asserted in Garrard's letter—namely, that granting petitioners refunds would be unfair to other taxpayers in other Barrett Law projects. Pet. App. 72a n.12 (citing Ind. R. App. P. 46(A)(8)(a)).

3. In a 3-2 decision, the Indiana Supreme Court reversed. The majority concluded that several "legitimate governmental interests" supported the City's actions. The first was "[p]roviding relief or support for citizens facing financial hardship." Pet. App 16. The majority did not, however, explain how that reason supported the City's refusal to offer petitioners any refund as opposed to the decisions to abandon the Barrett Law and refund unpaid assessments.

The majority also stated—again without explanation—that "it was reasonable for the City to believe that property owners who had already paid" the full $9,278 "were in better financial positions than those" who had paid a small fraction of that amount because they had "chose[n] installment plans." Pet. App. 16a. The majority acknowledged, however, that "there might be some property owners" who elected installment plans for reasons other than necessity, and that "it is possible that there are some who paid up front that are currently experiencing financial hardship." *Ibid.* But "it does not matter under rational basis review what the actual facts would show," the majority concluded, "so long as the issue was at least debatable when the governmental decision maker acted." The court of appeals had therefore erred, the majority concluded, in holding that the City was required on summary judgment to adduce "proof" of its after-the-fact hypothesis. *Ibid.*

The majority explained that it believed itself entitled to consider justifications other than those stated in the text of Resolution 101. It stated that *Allied Stores* stands only for the proposition that, after articulating an inadequate policy purpose.

"[t]he government may not then save the law [by] * * * rely[ing] on a different conceivable purpose that is contrary to or inconsistent with the stated purpose." Pet. App. 17a n.11 (citing *Allied Stores*, 358 U.S. at 529-530). The majority then identified two "other interrelated plausible policy reasons for Resolution 101." *Id.* at 17a. First, "[t]he City could have reasonably believed that the benefits of simplifying sanitary sewer funding outweighed the effort of continuing a collection system for thousands of taxpayers." *Id.* at 18a. The court did not explain how such a desire supported the City's refusal to issue refunds to petitioners; rather, the court stated simply that "the fact that [the City] chose to draw the line at November 1, 2005, was a matter of discretion appropriately exercised by the City and the Board." *Ibid.* (citing *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 108 (2003)).

Second, the majority concluded that "the decision not to issue refunds to those who had already paid implicates another legitimate interest—preservation of limited resources." Pet. App. 18a-19a. "The City clearly has a legitimate interest," the majority continued, "in not emptying its coffers to provide refunds to those who had already paid their assessments." *Id.* at 19a. It was enough that petitioners "each paid for a sewer and received a sewer," even though "[i]t is true that those whose assessments were discharged also received a sewer and did so at a lower price." *Ibid.*

The majority stated that petitioners had "[i]n essence" presented a "class-of-one" equal protection theory, "because they were treated differently than the other residents of Northern Estates." Pet. App.

23a The majority held, however, "that this is not a class-of-one case" because Resolution 101 "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances." *Id.* at 23a-24a. In any event, the majority continued, "there is no evidence that the City's action was motivated by animus or ill-will toward [petitioners]," which it held ought to be required for "class-of-one" claims. *Id.* at 24a.

The majority then examined this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*. "The effects of the tax schemes in *Allegheny Pittsburgh* and *Nordlinger* were the same," the majority observed, but this Court struck down the former and upheld the latter. Pet. App. 26a. *Allegheny Pittsburgh* "was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was" legitimate. *Id.* at 27a-28a. Far more important, the majority held, was this Court's supposedly "contrasting" decision in *Nordlinger*. *Id.* at 28a. The majority dismissed *Allegheny Pittsburgh* as "a class-of-one case," "which, again, the case before us is not." *Ibid.* (citing *Engquist*, 553 U.S. at 602; *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000); and *Bell* v. *Duperrault*, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring)). "[A]t a minimum," the court declared, "*Allegheny Pittsburgh* has essentially been narrowed to its facts." *Ibid.*

Justice Rucker, joined by Justice Dickson, dissented. "[M]erely declaring that Barrett Law funding 'imposed financial hardships on middle- and low-income property owners who were often most in need of sanitary sewers due to failing septic

systems,'" the dissent observed, "does nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments." Pet. App. 38a. Rather. the dissent agreed with the court of appeals that "[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners. *Id.* at 39a. The dissent also agreed with the court of appeals that, when a statute specifically declares its purpose, "it is inappropriate to consider other conceivable or even expressed rationales for the purpose of 'saving' an inadequately justified classification." *Id.* at 36a. "In my view," Justice Rucker concluded, "this disconnect demonstrates that the classification fails to have a 'fair and substantial relation' to the statutory objective." *Id.* at 39a (citing *Allied Stores*, 358 U.S. at 527).

SUMMARY OF ARGUMENT

I.A. As this Court unanimously held in *Allegheny Pittsburgh*, the Equal Protection Clause requires "rough equality in tax treatment of similarly situated property owners." *Nordlinger* reaffirmed *Allegheny Pittsburgh*; what matters most, the Court explained, is the backdrop against which each claim of unequal treatment is judged. In *Allegheny Pittsburgh*, West Virginia law explicitly required that all property be assessed at current market value; in *Nordlinger*, California law just as explicitly declared that property should be assessed based on the taxpayer's purchase price. Once a State has made a clear decision to treat a particular group of taxpayers as similarly situated, neither the State nor its organs or officials may thereafter subject them to grossly

unequal treatment, even if there might have been some basis for differentiating them from each other in the first instance. The common theme of these cases, this Court has more recently confirmed, is "the existence of a clear standard against which departures * * * could be readily assessed." *Engquist*, 553 U.S. at 602.

B. Here, Indiana law unequivocally declared that homeowners within each project must be treated equally. The City's refusal to grant petitioners refunds, however, left petitioners paying between 10 and 30 times more than their neighbors—indeed, homeowners who paid their assessments in full contributed roughly 80% of the funds the City actually collected for this project. This is the same kind and level of gross inequality struck down in *Allegheny Pittsburgh*, in a State that (like West Virginia in *Allegheny Pittsburgh*) promised equality. It should meet the same fate here.

C. The Indiana Supreme Court wrongly dismissed *Allegheny Pittsburgh* as a class-of-one case. The equal-protection analysis does not change based on the number of plaintiffs. This Court has so held, and it has rejected the requirement of specific animus that the Indiana Supreme Court suggested should govern "class-of-one" claims.

II.A. The City's asserted justifications for this severely unequal treatment are insufficient, even under rational-basis scrutiny. Much of what the City has said consists of efforts to defend actions *other than* the one that is actually challenged, *i.e.*, the denial of refunds. This litigation does not place into dispute the City's desire to help low-income taxpayers by abandoning the Barrett Law, its decision to adopt a new financing method, its need to

set a clear date for doing so, or the purported administrative burdens of collecting unpaid assessments. When the City gets around to offering up a reason that actually has something to do with the refusal to grant refunds to petitioners, the only reason the City invokes is that granting refunds "would have cost the city millions of additional dollars." Br. in Opp. 11.

B. Saving money is not a rational basis for such extreme disparities. Discriminatory taxation always "preserves resources," but that has never been accepted by this Court as sufficient to defeat an equal-protection challenge. The Indiana Supreme Court's apparent suggestion that refunds would impose administrative costs on the City is likewise misguided because it contradicts *Allegheny Pittsburgh* and because any burden here would be trivial.

C. The Indiana Supreme Court asserted that petitioners are not similarly situated to their neighbors who paid in installments because the latter are (in that court's view) of lesser financial means than the former. That suggestion is neither plausible in theory nor supported by an iota of record evidence. The Barrett Law operates on the exact opposite premise, and the City itself has acknowledged that a purported difference in financial means had nothing to do with its decision. Resolution 101 spoke only of the impact that the Barrett Law *generally* had on all taxpayers. The City also affirmatively told petitioners that its intent was to treat *all* taxpayers within the Brisbane/Manning project equally, and the City has conceded that "all of the City's other reasons for forgiveness without refunds"—other than cost

savings—"would have been accomplished if refunds were also extended."

In any event, this purported distinction is far too attenuated from the goal of helping low-income homeowners. As with other taxing schemes that have run afoul of the Equal Protection Clause, the City's actions are significantly overinclusive and underinclusive. Taxpayers could choose to pay in installments for any reason, or for no reason at all. And it blinks reality to assume that homeowners who actually paid $9,278 are *better off* than those who paid 1/30th of that amount. Moreover, the City could easily have favored the lowest-income homeowners through "more precise and direct classification[s]"—the City need only have made some legitimate effort to determine taxpayers' relative financial positions. If timing of payment were an adequate proxy for wealth, any number of bizarre distinctions—*e.g.*, whether taxpayers paid by check or credit card—would pass constitutional muster.

ARGUMENT

Other than the court below, every state supreme court to address the issue has held that the Equal Protection Clause prohibits tax-forgiveness measures that favor taxpayers who delayed full payment over those who promptly paid their tax assessments in full. *State ex rel. Stephan* v. *Parrish*, 891 P.2d 445 (Kan. 1995); *Armco Steel Corp.* v. *Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984); *Perk* v. *City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969); *Richey* v. *Wells*, 166 So. 817, 819 (Fla. 1936). Those decisions rest on the proposition—equally applicable here—that a taxing authority acts arbitrarily when it "prefer[s] those

who do not pay their taxes promptly over those who do." *Armco*, 358 N.W.2d at 844. That proposition is firmly grounded in this Court's precedents, and this Court should reverse the contrary decision of the Indiana Supreme Court.

I. THE CITY'S DISCRIMINATORY TAXATION SCHEME DENIES THE "ROUGH EQUALITY OF TAX TREATMENT" REQUIRED BY THE EQUAL PROTECTION CLAUSE

In *Allegheny Pittsburgh*, this Court held unanimously that a State, having declared that all property within a given class should be taxed equally, may not deny "rough equality in tax treatment" to the property owners in that class. 488 U.S. at 343. The City here flouted that principle. State law expressly required equal taxation, but the City's actions left petitioners paying between 10 and 30 times more than their next-door neighbors.

In upholding that gross disparity, the Indiana Supreme Court cast aside the teaching of *Allegheny Pittsburgh*, relying instead on the supposedly "contrasting" decision in *Nordlinger* and suggesting that *Allegheny Pittsburgh* had been "narrowed to its facts." Pet. App. 28a. Not so. The factual contexts in which those two cases arose were different, but this Court's reasoning was the same: A State's clearly articulated determination that taxpayers are similarly situated and should be taxed equally cannot be cast aside at a taxing authority's whim.

The court below also claimed that *Allegheny Pittsburgh* is "inapposite" because it was a "class-of-one" case. Wrong again. This Court has made clear that the number of individuals in a class is irrelevant

to the equal-protection analysis. The principle animating *Allegheny Pittsburgh*, and reaffirmed in *Nordlinger* and other cases, compels the conclusion that the City's discriminatory tax scheme violates the Equal Protection Clause.

A. Under *Allegheny Pittsburgh* And *Nordlinger*, A State's Explicit Requirement Of Equal Taxation Forbids Grossly Disparate Burdens On Taxpayers Within That Same Class

This Court has long recognized that "'[t]he equal protection clause * * * protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" *Allegheny Pittsburgh*, 488 U.S. at 345-346 (quoting *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 623 (1946)). That requirement—and the role that state-law principles play in determining that particular property owners are within the same class for tax purposes—drove this Court's decisions in *Allegheny Pittsburgh* and *Nordlinger*.

Allegheny Pittsburgh involved a challenge to property assessments in Webster County, West Virginia. West Virginia's "Constitution and laws provide[d] that all property of the kind held by petitioners shall be taxed at a rate *uniform* throughout the State according to its estimated market value." 488 U.S. at 345 (emphasis added); see W. Va. Const. Art. X, § 1 ("[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law."). The Webster County assessor, however,

updated property assessments only when the property in question had been recently sold (while making negligible adjustments to other property). *Allegheny Pittsburgh*, 488 U.S. at 338. As a result, gross disparities existed in the valuation—and therefore taxation—of otherwise entirely comparable properties: Properties that had recently been sold were assessed at values 8 to 35 times greater than were comparable properties that had not recently been sold. This Court held unanimously that the assessment practice violated the Equal Protection Clause.

The Court first made clear that the petitioners' complaint was a comparative one: It was grounded not in a claim that their tax assessments were too high in some abstract sense, but rather in the fact that the assessments were greater than the assessments of comparable properties of their neighbors. 488 U.S. at 342. As a result of that gross disparity, Webster County had failed to achieve the "seasonable attainment of a rough equality in tax treatment of similarly situated property owners" required by the Equal Protection Clause. *Id.* at 343.

This Court acknowledged States' freedom to divide property into different classes for tax purposes (provided, of course, that the classification is supported by a rational basis). West Virginia, however, had *not* made any such distinction among its real-property owners. See 488 U.S. at 344-345. To the contrary, as noted above, state law demanded "uniform" taxation of property "according to its estimated market value." *Id.* at 345. The case thus fell comfortably within the established line of authority recognizing that systematic unequal

treatment of property that the State had already placed within the same class deprived owners of the equal protection of the laws. See, *e.g.*, *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350, 352-353 (1918). That was so even though the county assessor had an articulated basis—the timing of a property's most recent sale—for differentiating among property owners.

Three years later, this Court in *Nordlinger* confronted a question expressly left open in *Allegheny Pittsburgh*: whether the disputed assessment scheme "would stand on a different footing" if a State *had* expressly chosen to adopt a generally applicable assessment system based on a property's historical acquisition value rather than its current market value. See *Allegheny Pittsburgh*, 488 U.S. at 344 n.4. That is, would it matter that the State had chosen the assessment practice at issue in *Allegheny Pittsburgh* from the outset? Yes.

The State of California had, through the ballot initiative commonly known as Proposition 13, adopted just such a system of acquisition-value-based property taxation. See 505 U.S. at 3-4. That system resulted in the same disparities between otherwise comparable properties that existed in *Allegheny Pittsburgh*. But the scheme set a different baseline against which to measure the "rough equality" demanded by the Equal Protection Clause. Proposition 13 explicitly favored homeowners who had purchased at historically lower prices over those who had purchased at more recent, higher prices.

This Court held that Proposition 13 furthered two legitimate policy considerations. First, the assessment scheme served the legitimate state purpose of

"neighborhood preservation, continuity, and stability" by discouraging rapid turnover in the ownership of homes and businesses. 505 U.S. at 12. Second, the State could reasonably conclude that a new owner who had just purchased a property fully cognizant of the accompanying tax burden has less of a reliance interest in a lower level of taxation than a long-term owner. *Id.* at 12-13. The classification therefore served the purpose of protecting the "legitimate expectation and reliance interests" of the citizenry, *id.* at 13, interests that are not just "'a legitimate governmental objective'" but in fact "'an exceedingly persuasive justification'" for a State's classification, *ibid.* (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984)). California's assessment scheme therefore survived rational-basis scrutiny.

Nordlinger thus arose in a markedly different *factual* context than *Allegheny Pittsburgh*, but the Court's *legal* inquiry was the same: Was there a plausible basis, judged in relation to the background policy choice the State had made, for the taxing authority to impose significant inequality among otherwise similarly situated property owners? The answer in *Nordlinger* was "yes," because Proposition 13 reflected a state determination that the petitioner (who had bought her property relatively recently and with full knowledge of Proposition 13's operation) was *not* similarly situated to her neighbors who had purchased their homes years earlier.

Nordlinger rejected the suggestion that the equal-protection principle it espoused was in conflict with *Allegheny Pittsburgh*. To the contrary, the Court in *Nordlinger* stressed that there was "an obvious and critical *factual* difference between" the two cases.

505 U.S. at 14-15. In *Allegheny Pittsburgh* there was no "indication * * * that the policies underlying an acquisition-value taxation scheme could *conceivably* have been the purpose for the Webster County tax assessor's unequal assessment scheme." *Id.* at 15 (emphasis added). That is, even if Webster County had claimed in *Allegheny Pittsburgh* that it was pursuing such policies, the claim would have been untenable. That is because such a purported interest was entirely inconsistent with the baseline standard of market-value equality established by West Virginia law, and there was "'no suggestion' that 'the State may have adopted a different system in practice from that specified by statute.'" *Ibid.* (quoting *Allegheny Pittsburgh*, 488 U.S. at 345). Indeed, the county in *Allegheny Pittsburgh* had even claimed (as here, see p. 48, *infra*) that the challenged assessment practice somehow *furthered* the equal-taxation norm set forth in state law. *Ibid.* The facts in *Allegheny Pittsburgh* therefore "precluded any *plausible* inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Ibid.* (emphasis added).

Unlike the court below, seven of the nine Justices participating in the *Nordlinger* decision therefore recognized that *Nordlinger* and *Allegheny Pittsburgh* are consistent.[6] Read together, both cases confirm that there is significance to a State's declaration that

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[6] Justice Thomas wrote separately to explain that he "agree[d] with Justice Stevens," the lone *Nordlinger* dissenter, "that *Allegheny Pittsburgh* cannot be distinguished." 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment).

certain taxpayers are—or, as in *Nordlinger*, are not—similarly situated. Such a declaration is not fully dispositive in either direction—merely "violating state law requiring uniformity of taxation of property" does not necessarily make out an equal protection violation, 505 U.S. at 16 n.8, nor is a State's classification scheme necessarily rational, which is why the Court in *Nordlinger* assessed for rationality the State's proffered justifications, *id.* at 12-13, 16-17. But a taxing authority's effort to deny that taxpayers are similarly situated must be judged in reference to background principles of state law and what the authority itself has said on the matter.

This principle has a long pedigree. It was well established before *Allegheny Pittsburgh* that the Equal Protection Clause acts as a bar against "state action which selects [an individual] out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough*, 326 U.S. at 623. Indeed, this Court recognized almost a century ago—and has consistently reiterated—that "it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." *Sunday Lake Iron Co.*, 247 U.S. at 352-353; see *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 539-540 (1933); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments*, 284 U.S. 23 (1931); *Chicago Great W. Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 447 (1923); *Southern Ry.* v. *Watts*, 260

U.S. 519, 526 (1923).[7] *Allegheny Pittsburgh* represented a straightforward application of that principle.

This Court has reaffirmed the continuing vitality of *Allegheny Pittsburgh* since *Nordlinger*. In *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). for example, the Village required a 15-foot easement from all property owners seeking access to a municipal water supply. The Village allegedly departed from that uniform requirement, however, by requiring the petitioner to grant a 33-foot easement for the exact same benefit. Relying on *Allegheny Pittsburgh* and other cases, *id.* at 564, this Court held that the complaint stated a claim "under traditional equal protection analysis," *id.* at 565. The purpose of the Equal Protection Clause, this Court reaffirmed, "is to secure every person within

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[7] In *Cumberland Coal*, for example, this Court faced a situation similar to that in *Allegheny Pittsburgh* and resolved the case in an identical fashion. There, several Pennsylvania townships had adopted a taxation scheme whereby all virgin coal—which was supposed to be assessed based on market value—was assessed at a fixed price per acre in each township. Assigning the same value to all such coal, however, ignored the fact that its actual value varied greatly depending on its proximity to transportation facilities. See 284 U.S. at 25. This Court concluded that the townships' actions violated the Equal Protection Clause, explaining that "the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." *Id.* at 28. Thus, the Court held, the petitioners were entitled to a reassessment of their property, "put[ting] these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district." *Id.* at 30.

the State's jurisdiction against intentional and arbitrary discrimination." *Id.* at 564 (internal quotation marks omitted).

As this Court even more recently explained, "[w]hat seems to have been significant in *Olech* and the cases on which it relied"—including *Allegheny Pittsburgh*—"was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." *Engquist*, 553 U.S. at 602. Thus, the Court continued in *Engquist*, "[i]n *Allegheny Pittsburgh* * * * the applicable standard was market value, but the county departed from that standard in basing some assessments on quite dated purchase prices." *Id.* at 603.[8] As discussed below, here the City departed from the "applicable standard" that state law unequivocally established—equality among neighbors—and its departure resulted in gross disparities in tax treatment (a 30-fold difference in assessments paid). *Allegheny Pittsburgh* forecloses such discriminatory tax treatment.

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[8] The Court in *Engquist* likewise explained that *Sioux City Bridge Co.*, on which *Allegheny Pittsburgh* relied, "was the same sort of case, recognizing an equal protection claim when one taxpayer's property was assessed at 100 percent of its value, while all other property was assessed at 55 percent, without regard to articulated differences in the properties." 553 U.S. at 603.

B. The City's Discriminatory Tax Treatment Violates The Equal-Protection Principles Articulated In *Allegheny Pittsburgh* And *Nordlinger*

This case is on all fours with *Allegheny Pittsburgh*. In *Allegheny Pittsburgh*, the State's "Constitution and laws provide[d] that all property of the kind held by petitioners shall be taxed at a [uniform] rate." 488 U.S. at 345. So too here. The Indiana Constitution provides that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." Ind. Const. Art. 10, § 1.

The Barrett Law itself expressly required that all costs for sewage projects be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15(b)(3). And the City (initially) complied with that directive: The properties included in the Brisbane/Manning project area were all assessed an equal share of the project's cost—$9,278.

Homeowners were free to choose—for any reason or no reason—whether to pay the assessments immediately or in installments. But again the Barrett Law left no doubt that an installment-plan taxpayer was firmly on the hook for the assessment. When a taxpayer selected installments, he or she was required to execute a binding agreement not to dispute the tax and to pay the amounts owed (with applicable interest) promptly. The City also retained a lien on the taxpayer's property (just as it held a lien on the property of those electing a lump-sum

payment until that obligation was discharged). Ind. Code § 36-9-36-40; *id.* § 36-9-36-43.

Even as the City transitioned from the Barrett Law to STEP, equality remained the norm. Homeowners connecting to the municipal sewer system now pay a flat fee of $2,500. App., *infra*, 24a. In other words, as in *Allegheny Pittsburgh*, the City here specifically determined—multiple times, in multiple ways—that petitioners' and their neighbors' property should be assessed equally regardless of whether the homeowners chose to pay in full or in installments.

As in *Allegheny Pittsburgh*, however, the City reversed course and wildly "departed from that standard." *Engquist*, 553 U.S. at 603 (citing *Allegheny Pittsburgh*, 488 U.S. at 341). When the City abandoned the Barrett Law funding mechanism, it forgave all assessments owed by those homeowners who had elected to pay their assessments in monthly installments. But the City refused to provide *any* refunds to those homeowners who had paid their assessments in full.

That decision resulted in precisely the same "gross disparities in the assessed" taxes on "generally comparable property" produced by the assessment practice in *Allegheny Pittsburgh*. 488 U.S. at 338. There, the petitioners' properties were taxed on the basis of an assessment that was 8 to 35 times as great as that assigned to comparable neighboring properties. *Id.* at 341. Here, petitioners were required to pay 10 to 30 times as much as their neighbors whose property was identically situated with respect to the City's sewer project.

As a result of the City's decision, the owners of the 39 properties forced to pay their full assessments (including petitioners) contributed roughly 80% of the total sum collected by the City. See note 4, *supra*. And, just as in *Allegheny Pittsburgh*, "there [is] no suggestion that the 'dramatic differences in [tax burdens]' for similar"—indeed, functionally *identical*—"property parcels were based on subjective considerations of the sort on which [taxing authorities] often rely." *Engquist*, 553 U.S. at 603 (quoting *Allegheny Pittsburgh*, 488 U.S. at 341). Rather, the tax burden was precisely if arbitrarily calculated—whatever amount had been paid by November 1, 2005—and the Garrard affidavit makes clear that fairness as between petitioners and their similarly situated neighbors was not a factor that the City even considered, subjectively or otherwise.

Nor is this a case like *Nordlinger*, where the classification served "to protect legitimate expectation and reliance interests." 505 U.S. at 13. Quite the opposite: The City's 180-degree change of course directly undermined taxpayers' "legitimate expectation and reliance interests." *Ibid.* The City gave homeowners the choice of how to pay their assessments—up front or in installments—and it assured all homeowners that they would (as state law required) be assessed equally, regardless of *how* they elected to pay. By imposing a draconian 30-fold penalty on homeowners who elected to pay their assessments in full—and *only* because they elected to pay their assessments in full—the City's disparate tax treatment undermined taxpayers' legitimate expectation and reliance interests.

The Indiana Supreme Court stated, as if it somehow were a justification for the disparate treatment at issue, that "[t]he plaintiffs each paid for a sewer and received a sewer, along with all the attendant public health benefits associated with sanitary sewers." Pet. App. 19a. In other words, the court below deemed it sufficient that petitioners "got what they paid for." That argument misses the point entirely. As this Court explained in *Allegheny Pittsburgh*, "[v]iewed in isolation, the assessments for petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." 488 U.S. at 346; see *id.* at 342 (noting that petitioners' complaint "is a comparative one").

"The right invoked is that to equal treatment." *Iowa-Des Moines Nat'l Bank*, 284 U.S. at 247. Thus, the supposition that petitioners "got what they paid for" is, like the fact that a given property happens to be assessed at its actual market value, irrelevant to the equal-protection analysis.

C. The Indiana Supreme Court Wrongly Dismissed *Allegheny Pittsburgh* As Relevant Only To "Class-of-One" Cases

The Indiana Supreme Court did not dispute that in this case, as in *Allegheny Pittsburgh*, Indiana and the City required uniform assessments for home-owners in the Brisbane/Manning project area. And the court did not dispute that in this case, as in *Allegheny Pittsburgh*, the City then treated taxpayers within the class it established differently

by forcing some taxpayers to pay 30 times more than others. The Indiana Supreme Court suggested, however, that *Allegheny Pittsburgh* is irrelevant because that case was supposedly a "class-of-one" case, whereas this case is not.

There is, however, no separate category of "class-of-one" cases in which a different analysis applies. This Court has made clear that class-of-one cases represent "not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as * * * an application of that principle." *Engquist*, 553 U.S. at 602. Thus, "[w]hether the complaint alleges a class of one or of five is of *no consequence* because we conclude that the number of individuals in a class is *immaterial* for equal protection analysis." *Olech*, 528 U.S. at 564 n.* (emphasis added). Shoehorning a case into that supposed category therefore does nothing to distinguish *Allegheny Pittsburgh*.

Accordingly, the Indiana Supreme Court's only suggested distinction of the City's refund decision—that the decision "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances" (Pet. App. 24a)—is no answer at all. The purported breadth of the "classification" in this case is a vice, not a virtue: Subjective considerations sometimes have a legitimate role to play in tax assessments. *Engquist*, 553 U.S. at 604. Here, just as in *Allegheny Pittsburgh*, the broad, objective, and utterly arbitrary "classification" is a purported distinction irrationally grafted onto a group of properties already recognized as identically situated for purposes of the tax in question.

The court below also suggested that "class-of-one cases" require plaintiffs to demonstrate that "underlying the government's decision is animus or ill-will toward the plaintiffs." See Pet. App. 22a-23a (citing *Olech*, 528 U.S. at 566 (Breyer, J., concurring in the result), and *Bell*, 367 F.3d at 709-713 (Posner, J., concurring)). But the "animus" requirement embraced by the court below comes from an opinion concurring in the result in *Olech* and has never been endorsed by this Court, which instead has declared the number of individuals in a class "immaterial." In any event, *Allegheny Pittsburgh* itself involved a uniformly applied but arbitrary rule and did not turn on—or even contain hints of—any perceived animus. The application of that case to this one therefore cannot be conditioned on such a showing.

II. THE PROFERRED *POST HOC* JUSTIFICATIONS FOR DISCRIMINATING AMONG NORTHERN ESTATES HOMEOWNERS ARE MERITLESS

Determining the reason for the City's refusal to grant petitioners relief even roughly equivalent to that afforded to their neighbors requires no guesswork. The City has acknowledged that it picked November 1, 2005, as the cut-off date because it would cost too much money to grant petitioners refunds. But that does not even begin to suggest a rational basis for treating petitioners so much worse than their identically situated neighbors—were it otherwise, even the most blatantly discriminatory tax could be justified on the ground that doing it another way would cost more. The Indiana Supreme Court's (conclusory) suggestion that petitioners—who already paid the full $9,278—are *better off*

financially than their neighbors who paid 3⅓%-10% of that amount is implausible on this record, particularly considering the City's repeated disavowals of any purpose other than saving money and picking a date certain to end the Barrett Law.

A. The Only Reason The City Has Asserted For Refusing Refunds To Petitioners Is The Desire To Save Money

It is important to recall the government action that is actually at issue in this case. The action challenged here is not the City's decision to impose the initial assessment under the Barrett Law. It is not the City's decision to abandon the Barrett Law funding mechanism and replace it with STEP. And, most important for present purposes, it is not the City's decision to forgive the debts of those who delayed full payment of their tax assessments. The sole decision challenged here is the City's separate decision to *withhold* similar relief from petitioners simply because they had already paid their tax bills in full. And the primary justification the City has offered for that decision was the City's interest in preserving financial resources.

The prefatory language in Resolution 101 states that "[t]he Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." App., *infra*, 25a. The Indiana Supreme Court accepted that declaration as a rational basis for the City's action here. But that observation—that the Barrett Law as a whole presented a burden on lower- and middle-income homeowners—explains only the City's decision to abandon the Barrett Law

funding mechanism. It says nothing about what to do with those who had already paid their Barrett Law assessments in full, and those who had not. The City's *subsequent* decision to let one group have sewer services despite having paid only a small fraction of their cost, while leaving the other group much worse off just because they didn't elect the installment plan, is what is at issue here, not the universally applauded abandonment of the Barrett Law.

The additional justifications that the City put forth on summary judgment in the Garrard Affidavit (which were accepted by the Indiana Supreme Court) likewise miss the mark. That affidavit—prepared for litigation more than two years after the Board passed Resolution 101—provides four justifications for Resolution 101. JA75-76. As the affidavit itself makes clear, however, those justifications support only the City's decision to "eliminate the Barrett Law method of financing" and its decision to "forgive money owed." JA75. The Garrard Affidavit does not purport to justify the City's decision to discriminate between taxpayers who delayed full payment of their assessments and those who paid in full.

The first two justifications set forth in the Garrard Affidavit simply restate the City's reasons for abandoning the Barrett Law funding system and adopting STEP. JA75. As noted, both legislative determinations are beside the point.

Third, the Garrard Affidavit explains that "it was essential for the City to establish a clear date for the change [to STEP] and move forward with the new funding approach." JA76. The court below agreed that "the fact that [the City] chose to draw the line at

November 1, 2005, was a matter of discretion appropriately exercised by the City." Pet. App. 18a. But petitioners challenge the consequences the City attached to that date, not the setting of a date. All new government programs must, of course, have a starting point. But the City could have set a date for the transition to STEP without discriminating between taxpayers who paid in full and those who paid in installments: It could have waived whatever nondiscriminatory portion of the Barrett Law assessments it saw fit to forgo, for both groups of taxpayers or for neither group. Instead, the City chose to treat similarly situated people differently, forgiving the debts of taxpayers who elected to pay their assessments in installments but withholding refunds from those who paid them in full. That distinction bears no relationship to the goal of moving forward with the STEP funding mechanism.[9]

Finally, the Garrard Affidavit states that "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers and [would] defeat the purpose of the flat-rate per connection—namely simplifying things." JA76. Those administrative-convenience

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[9] Indeed, the $2,500 STEP fee applied to *new* projects only; taxpayers who had partially paid for prior projects pursuant to the Barrett Law installment plan saw their debts completely erased—with no obligation to make any STEP payments to the City. App., *infra*, 24a. Thus, the City's purported interest in transitioning to STEP was not even furthered by the City's decision to forgive the debts of installment-plan payers—much less by its decision to treat such taxpayers differently from those who chose to pay their assessments in full.

rationales explain the City's decision to forgive the debts of taxpayers who owed money under the abandoned Barrett Law regime; they do not provide any basis for the City's decision to withhold refunds from taxpayers who had paid their Barrett Law assessments on time.

To withstand scrutiny under rational-basis review, the classification challenged must "be rationally related to a legitimate state interest." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Here, however, the City's classification—early vs. late payers—bears no relationship whatsoever to *any* of the government interests advanced in either Resolution 101 or the Garrard Affidavit. That is because each of those rationales serves only to justify decisions separate from the City's decision to discriminate against taxpayers who timely paid their assessments in full.

Indeed, the City has conceded in this Court that *all* of its purported goals for enacting Resolution 101 would have been equally served by providing refunds to taxpayers who paid their Barrett Law assessments up front. In its Brief in Opposition, the City acknowledged that "[petitioners'] solution of additional refunds would accomplish *the same goals*, but would have cost the city millions of additional dollars as a result." Br. in Opp. 11 (emphasis added). And the City likewise conceded that "[p]etitioners are correct that *all* of the City's *other* reasons for forgiveness without refunds *would have been accomplished* if refunds were also extended." *Id.* at 6 (emphasis added).

In other words, the City has admitted that the only interest advanced by its decision to withhold

refunds was its interest in keeping petitioners' money. Pet. App. 19a. As explained below, that cannot constitute a rational basis for this discriminatory taxation scheme.

B. The City's Interest In Cost Savings Cannot Justify Its Arbitrary Distinction Between Similarly Situated Taxpayers

The Indiana Supreme Court held that "[t]he City clearly has a legitimate interest in not emptying its coffers to provide refunds to those who had already paid their assessments." Pet. App. 19a. The court also determined that the City had a legitimate interest in "reducing its administrative costs." *Ibid.* A long line of this Court's authority holds otherwise.

1. "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler* v. *Doe*, 457 U.S. 202, 227 (1982). This Court has applied that commonsense principle with particular force in the taxation context. In *Williams* v. *Vermont*, 472 U.S. 14 (1985), for example, this Court addressed a taxation scheme that provided a tax credit exclusively to automobile owners who were Vermont residents at the time they paid their automobile use tax. Revenue raised through the tax was intended to improve the State's highway system and pay the principal and interest on government bonds. This Court explained that "the only plausible justification for imposing the tax on those in appellants' position in the first place—*apart from the simple desire to raise funds*—is the principle that those using the roads should pay for them." *Id.* at 25 (emphasis added). Applying rational-basis review, the Court held that the State's user-fee rationale was not

rationally furthered by the discriminatory tax. *Id.* at 25-27. The Court therefore rejected the argument that "the simple desire to raise funds"—the same basic goal embraced in this case by the Indiana Supreme Court—constituted a rational basis for discriminatory tax treatment.

Similarly, in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869 (1985), the Court rejected as irrational purposes asserted to justify a statute that taxed in-state and out-of-state insurance companies at different rates. The disparity was reduced for out-of-state companies that invested in government securities. The trial court ruled (and the appeals court agreed) that the statute did not run afoul of the Equal Protection Clause because, in addition to raising revenue, the statute served to encourage investment in government securities. *Id.* at 873. This Court reversed, explaining that the State's desire to encourage investment in government securities was not "a legitimate state purpose when furthered by discrimination." *Id.* at 882. It was undisputed that the challenged statute worked to the State's financial advantage; if protecting a City's coffers were a sufficient interest, this Court would have upheld the distinction.

And in *Zobel* v. *Williams*, 457 U.S. 55 (1982), Alaska residents challenged a statutory scheme that distributed natural-resources income from the State's "Permanent Fund" to citizens based on their length of residence. Striking down the law under rational-basis review, this Court dismissed the State's asserted interest in "assuring prudent management of the Permanent Fund"—*i.e.*, its

interest in saving money used to provide government benefits. *Id.* at 61.

The clear lesson from those cases is that a mere desire to preserve resources cannot justify a discriminatory taxation scheme if the classifications themselves lack any rational relationship to some *other* legitimate objective. The reason for that rule is self-evident. The "core concern of the Equal Protection Clause" is to act "as a shield against arbitrary classifications." *Engquist*, 553 U.S. at 598. If an interest in raising (or preserving) revenue constitutes a sufficient basis for discriminatory tax treatment, however, then *every* tax—no matter how arbitrary—would pass constitutional muster. After all, a desire to raise or preserve revenue is presumably the reason why taxing authorities impose taxes in the first place. Such circular logic—that a tax scheme intended to save money is rational because it was intended to save money—cannot possibly serve as a rational basis for a discriminatory tax.

The Indiana Supreme Court's "preservation of resources" rationale therefore lacks any limiting principle in the tax context. A government could impose a greater property tax on houses with even-numbered street addresses than houses with odd-numbered addresses. Or it could deny tax refunds to redheads while providing refunds to similarly situated brunettes. In both cases, the result of the taxation scheme would be to bolster the government's coffers. If the cost-savings rationale advanced by the Indiana Supreme Court is accepted, such "palpably arbitrary" taxation schemes would evade constitutional scrutiny. *Allied Stores*, 358 U.S. at 527.

2. The "administrative convenience" rationale fares no better. For starters, it is not entirely clear (because the Indiana Supreme Court did not say) what administrative burden it had in mind. If the court was concerned simply with the costs of collecting unpaid assessments, that goes only to the decision to forgive, not to the decision to refuse to issue refunds to petitioners. If the court believed that issuing refunds would impose these costs, that concern should not long detain this Court.

For starters, it is difficult to imagine a case in which the administrative burden could be lighter. Petitioners sought a refund equal to the difference between the amount they paid and the amount refunded to their neighbors. Those figures were not seriously in dispute, and all that remained for the City to do was cut a check. Surely an aversion to basic arithmetic cannot justify the City's refusal to rectify a 30-fold disparity in tax treatment.

In any event, *Allegheny Pittsburgh* forecloses "administrative convenience" as a justification for unequal tax treatment of similarly situated persons. There, the County argued that the "administrative costs" of assessing property values—including "expensive mineral exploration procedures"—justified the decision to base assessments on a property's purchase price rather than on its assessed value. Brief of Respondent at *22, *Allegheny Pittsburgh*, 488 U.S. 336 (1989) (No. 87-1303), 1988 WL 1025749. That argument (which rested on an administrative burden far greater than any present in this case) failed to sway this Court—and for good reason. As the taxpayers in *Allegheny Pittsburgh* observed, the "administrative convenience" rationale is "routinely

the last refuge of arbitrary decisionmakers in equal protection cases." Joint Reply Brief for Petitioners at *16, *Allegheny Pittsburgh*, *supra*, 1988 WL 1025750. But "convenience alone can hardly justify unconstitutional discrimination. Otherwise, a system imposing the entire tax burden on all those whose names begin with 'A,' or on all those who live in one county, would be constitutional as easier to administer than other systems." *Ibid.*

Like the simple cost-savings justification, then, the Indiana Supreme Court's administrative-convenience theory proves far too much. It is easier to withhold refunds than it is to pay them. It is easier to tax one person $200 than it is to tax two people $100 each. It is easier to assess a property's value based on its last purchase price than it is to assess it in reasonable relation to its current market value. If accepted as a rational basis for discriminatory tax treatment, the administrative-convenience rationale would give taxing authorities carte blanche to implement wholly arbitrary taxation schemes and schemes this Court has unanimously struck down.[10]

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[10] In many respects, the administrative-costs rationale is just the cost-savings rationale by another name. Administrative burdens are often purely financial in nature. See, *e.g.*, Brief of Respondent at *22, *32, *Allegheny Pittsburgh*, *supra* (arguing, unsuccessfully, that the "expens[e]" required to accurately assess property values justified the County's decision to use an easier—and cheaper—valuation method); cf. *Judulang* v. *Holder*, No. 10-694, slip. op. 21 (Dec. 12, 2011) ("Cost is an important factor for agencies to consider in many contexts. But cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to [make a decision].").

C. The Indiana Supreme Court's *Post Hoc* Rationale For The City's Decision To Withhold Refunds Cannot Sustain The City's Discriminatory Tax Treatment

The Indiana Supreme Court stated (without explanation) that it would have been "reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." Pet. App. 16a. But it is inconceivable on this record to believe that such a distinction had anything to do with the City's refusal to issue petitioners refunds. Indeed, as noted above, the City has conceded that "*all* of the City's *other* reasons for forgiveness without refunds" besides cost savings "*would have been accomplished* if refunds were also extended." Br. in Opp. 6 (emphasis added).

The Equal Protection Clause requires that there be "a plausible policy reason for the classification," that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker," and that "the relationship of the classification to its goal [not be] so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11; see *Fitzgerald*, 539 U.S. at 110. The rationale offered by the Indiana Supreme Court—that it would have been reasonable for the City to believe petitioners were "in better financial positions than those who chose installment plans," Pet. App. 16a—flunks this test.

First, the justification offered for a classification must have been a "*plausible* policy reason for the classification." *Nordlinger*, 505 U.S. at 11 (emphasis

added); see also *Williams*, 472 U.S. at 25 (requiring a "plausible justification"). For example, in *Allegheny Pittsburgh* the "facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme" because the State had a policy that properties be taxed at a uniform rate. *Nordlinger*, 505 U.S. at 16.[11]

Here, too, the "facts preclude[] any plausible inference" that the City's purpose for withholding refunds from petitioners was that it believed that petitioners should bear a disproportionate share of the costs of sewer upgrades. That is because the City itself has expressly—and repeatedly—repudiated the notion that Northern Estates property owners are differently situated from one another based on their respective financial positions.

As noted above, the Barrett Law under which petitioners were assessed required that all costs for sewage projects be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15(b)(3). The Barrett Law also required the costs incurred for each project to correspond to the benefit received. *Id.*

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[11] See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, *unless* an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation.") (emphasis added and internal quotation marks omitted); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

§ 36-9-39-17(a), (b); *id.* § 36-9-39-23(b). Consistent with those requirements, the City treated all homeowners within the Brisbane/Manning project equally, assessing each owner $9.278.[12] That assessment was no less binding on homeowners who opted for the installment plan than on those who paid up front. See pp. 3-4, *supra* (detailing strict enforcement regime for all Barrett Law assessments).

In its letter responding to petitioners' request that the City refund their excess Barrett Law payments, the City reiterated that, "[i]n establishing project areas, the City's *intent is to treat property owners within each project area equitably*, based upon the scope and value of each specific project." JA50 (emphasis added). The *only* rationale the City offered for its decision was its desire to "move forward with the new funding approach" on November 1, 2005. JA51. Thus, even after enacting Resolution 101, and even after refusing to refund excess payments, the City maintained that its policy goal was to treat *all* property owners within each project "equitably," and that the burden assessed on each homeowner was based only on the "scope and value of each specific project"—not on the finances of each individual homeowner.

In other words, the City declared a policy of *equal* tax treatment of all homeowners within the Brisbane/Manning project area and made an express

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[12] The STEP funding mechanism that replaced the Barrett Law also required equal tax treatment: Under that program, all property owners are charged the same flat fee of $2,500 for a new sewer connection. App., *infra*, 24a.

determination that all such homeowners were *similarly* situated in all relevant respects (*i.e.*, with respect to their required contribution for the benefit received). The Indiana Supreme Court's theory, however, requires one to believe the exact opposite: that the City had a policy of *unequal* treatment and believed that homeowners within the same project area were *not* similarly situated.

In addition, the text of Resolution 101 itself declared that the Barrett Law *generally* was burdensome to lower- and middle-income families. It did not state that the decision to withhold refunds was based on any belief that petitioners were "in better financial positions than those who chose installment plans." Pet. App. 16a. This Court has made clear that, when statutes have "specifically declared their purpose," they leave "no room to conceive of *any other purpose* for their existence." *Allied Stores*, 358 U.S. at 530 (emphasis added); see *Nordlinger*, 505 U.S. at 16 n.7 (citing *Allied Stores*).

Even after litigation commenced, the City did not contend that there was a connection between its disparate treatment of the two groups of taxpayers and any putative difference in their financial means. Indeed, when attempting to justify the City's actions on summary judgment, the Garrard Affidavit simply reiterated that the City sought to "establish a clear date for the change" to the STEP funding mechanism. JA76. Thus, the City stated that the only purpose for distinguishing between taxpayers who had paid their assessments in full and those who had delayed full payment was its desire to draw an arbitrary line.

Moreover, as noted above, the City has conceded in this Court that, other than its goal of preserving limited resources, "*all* of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended." Br. in Opp. 6 (emphasis added); see also *id.* at 11.[13] The City has therefore disclaimed the existence of any *other* rational basis for that distinction—including any rationale predicated on the assumption that "property owners who had already paid their assessments were in better financial positions than those who chose installment plans." Pet. App. 16a.

Second, the rationale offered by the Indiana Supreme Court violates this Court's command that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985); see *Nordlinger*, 505 U.S. at 11. This

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[13] In between these multiple concessions, the Brief in Opposition (at 14) quotes the Indiana Supreme Court's assertion that "'it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans.'" But respondents stop short of claiming that they had made this argument in the trial court or actually relied on it in the Indiana Supreme Court. Respondents' tactic is reminiscent of the respondent in *Allegheny Pittsburgh*, who "obliquely referred in a footnote to the advantages of historical cost accounting," which did not suffice as "an assertion of the general policies supporting acquisition-value taxation." *Nordlinger*, 505 U.S. at 15 n.6. Furthermore, the half-hearted argument is—again, as in *Allegheny Pittsburgh*—"nonsensical given its inherent inconsistency with [respondents'] principal argument that" their decision was driven solely by the need to save money. *Ibid.*

Court has often applied that rule in rational-basis cases to strike down classifications that are significantly "underinclusive" or "overinclusive." *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974).

In *Lindsey* v. *Normet*, 405 U.S. 56 (1972), for example, this Court invalidated under rational-basis review a state statute that required some appellants to post a greater appeal bond than others. The Court rejected the State's argument that the requirement served to screen out frivolous appeals, noting that the statute "not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78.

Along similar lines, in *Williams* v. *Vermont*, *supra*, the State argued that its decision to limit an automobile tax credit to Vermont registrants who were residents of the State at the time of their automobile purchase rationally furthered the State's interest in maintaining and improving its roads. This Court held that residence at the time of purchase was a "wholly arbitrary basis," 472 U.S. at 23, because the "purposes of the statute would be identically served" by taxing Vermont registrants who were State residents when they purchased their car *and* those who were not, *id.* at 24. In reaching that conclusion, this Court explained that even on rational-basis review the "choice of a proxy criterion * * * cannot be so casual as this, particularly when a more precise and direct classification is easily drawn." *Id.* at 23 n.8.

Here, the Indiana Supreme Court "rel[ied] on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary

or irrational." *City of Cleburne*, 473 U.S. at 446. The court stated that the City's distinction between taxpayers who had paid their assessments in full and those who had paid in installments advanced the City's interest in aiding the poor because the City could have reasonably believed that the early payers were in a better financial position than the late payers. As in *Williams*, however, the "purposes of the statute would be *identically* served" by forgiving the debts of those who paid in installments *and* providing refunds to those who paid in full. *Williams*, 472 U.S. at 24 (emphasis added). Refunding excess payments to petitioners, after all, would do nothing to diminish the relief enjoyed by installment-plan taxpayers whose debts were erased.

And here, too, there is "a more precise and direct classification easily drawn": If the City wanted to discriminate on the basis of financial position, it could have just discriminated on the basis of financial position. That is, the City could have waived (through forgiveness and refunds) Barrett Law assessments for taxpayers who were *actually* lower- and middle-class relative to all Northern Estates homeowners—regardless of whether they chose to pay their assessments in full or over time.

Or suppose the City had determined that it could afford to grant only a certain amount of relief—say, the approximately $1.24 million in forgiveness it awarded to the installment-plan homeowners. Achieving equality was well within reach. If the City had spread that benefit equally among the approximately 180 parcels in the Brisbane/Manning project, each homeowner would have received roughly $6,900 in forgiveness or refunds and paid about $2,400

toward the project—which is almost exactly what *all* homeowners now pay for sewer connections under the STEP plan that replaced the Barrett Law. That is, if the Brisbane/Manning project were built today, all 180 homeowners would pay about the same amount as if the City had granted petitioners their requested refunds. Thus, any suggestion that granting petitioners refunds would have prevented the City from offering necessary relief to the supposedly lower-income homeowners paying in installments rings hollow.

The problem with the City's decision is not just that the Barrett Law explicitly declared that all homeowners should be treated equally or that there is nothing in the record to suggest any correlation *at all* between timing of payments and wealth. Even if some correlation does exist, the City's scheme denied refunds to some of the very lower- and middle-income taxpayers that it supposedly aimed to assist, and forgave the debts of some taxpayers who were in a better financial position—as the court below acknowledged. Pet. App. 16a.[14]

It bears repeating that the taxpayers who were denied relief were out of pocket thousands more than those who received it—yet the City supposedly concluded that those homeowners were *better off* than those who'd paid only a fraction of that amount.

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[14] Indeed, in the parallel class action filed in federal court, discovery confirmed that many of those taxpayers were senior citizens with limited fixed incomes (but sufficient assets to cover the assessments), and others took out home equity loans to pay their assessments up front. Memorandum in Support of Plaintiffs' Motion for Summary Judgment 12-13, *Cox* v. *City of Indianapolis*, No. 09-435 (S.D. Ind. June 14, 2010).

The City's classification is therefore wildly underinclusive and overinclusive.

The attenuated correlation embraced by the court below would authorize wholly arbitrary disparities in tax treatment. Consider, for example, the fact that nearly every State and many localities allow taxpayers to pay income and/or property taxes by either credit card or by check. Suppose that, after collecting taxes, a county changes its tax scheme in an effort to reduce the financial burden on lower- and middle-income homeowners. The county determines that it can afford to refund taxes to some, but not all, homeowners. Can it provide refunds only to those who paid their taxes by credit card—and thus can pay their bill over time—and deny refunds to those who paid by check?[15]

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[15] Even more attenuated proxies can be imagined, if (as the Indiana Supreme Court supposed) it does not matter on rational-basis review how tight or loose the fit is or whether any actual facts have been examined. For example, a legislator might conclude from her experience that people whose last names begin with the letter "V" are more likely than the average person to be of northern European (specifically, Dutch or German) extraction and especially unlikely to be of African descent; that people of northern European extraction tend, on the whole, to be better off economically than people of African descent; and that, therefore, tax debts should be forgiven for everyone except people whose last names begin with "V." Because there is no heightened scrutiny for laws that discriminate against people with V-surnames, the standard of scrutiny would be rational-basis review, yet the classification would be a paradigm of irrationality and would surely be struck down, even if adopted in complete good faith and even if some weak correlation between wealth and V-surnames could be demonstrated.

The court below suggested (Pet. App. 16a) that *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supports the after-the-fact use of attenuated proxies to justify inequalities on rational-basis review. The court went so far as to say that *Clover Leaf Creamery* stands for the proposition that "it does not matter under rational basis review what the actual facts would show." Pet. App. 16a. But that case is quite different. The Minnesota statute at issue expressly stated that the legislature had made various factual findings regarding the costs and benefits of plastic milk containers. What this Court rejected was excessively intrusive scrutiny, on rational-basis review, into whether the legislature's express factual findings turned out to be right. The Court did not say that a court may imagine, after the fact, a factual premise that the legislature *could have* acted on but did not, and that the same court may then say that it does not matter whether the facts necessary to support that premise are actually true. In this case, there is no indication that the City even *sought* to distinguish between the two groups of taxpayers on the ground that those who paid their assessments in full were better off than those who delayed full payment—much less that the City actually *considered* any evidence related to that question.

In sum, the Indiana Supreme Court's theory is reminiscent of Dr. Pangloss's insistence that the human nose is shaped as it is so that it can support spectacles. The court below essentially reasoned that, *because* the City gave the money to some taxpayers but not others, the City *therefore* could reasonably have believed that the beneficiaries

needed the money more. But we know that the City's discriminatory tax scheme was not—and could not plausibly have been—based on a belief that petitioners could (and should) bear a disproportionate share of the cost of sewer upgrades. That is because the City told us that its legislative purpose was to treat all taxpayers within the Brisbane/Manning project equally, not unequally. And the City told us that the sole justification for its decision to withhold refunds from petitioners was its desire to preserve financial resources. This Court should not turn a blind eye to the purposes actually articulated by the City by accepting this implausible and attenuated *post hoc* justification.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A

IC 36-9-37
Chapter 37. Barrett Law Funding for Municipalities

* * *

IC 36-9-37-4
Prerequisites for enforcement and collection of special assessments

Sec. 4. If a municipality levies special assessments against specific parcels of property under the Barrett Law, the municipal fiscal officer shall collect and enforce the special assessments and pay the bonds issued in anticipation of the collections of the special assessments if the following conditions are met:

(1) The municipal legislative body has by ordinance declared that the proposed improvement will be:

(A) a general benefit to the municipality and the citizens of the municipality; and

(B) a special benefit to the property owners in the area where the improvement is to be located.

(2) The ordinance has established the following:

(A) The general and special benefits described in subdivision (1).

(B) The proportions of the general and special benefits described in subdivision (1).

(3) The provisions of the Barrett Law have been followed.

As added by P.L.98-1993, SEC.8.

* * *

IC 36-9-37-6

Responsibility for payment of bonds; election to pay assessment in installments; collection

Sec. 6. If a property owner elects to pay the property owner's assessments in installments, the assessment shall be entered for collection on the improvement duplicate and shall be collected in the same manner as other taxes.

As added by P.L.98-1993, SEC.8.

IC 36-9-37-7

Municipal fiscal officers; surety bonds; personal liability

Sec. 7. (a) A municipal fiscal officer acting under this chapter shall, in the manner prescribed by IC 5-4-1, obtain, execute, and file a bond conditioned upon the following:

(1) The faithful compliance of the municipal fiscal officer with this chapter.

(2) The faithful accounting for all money coming into the municipal fiscal officer's possession under the Barrett Law.

(b) A municipal fiscal officer who does any of the following is personally liable to a person suffering loss due to that action and may be removed from office by proper action filed under IC 5-8-1-35:

(1) Fails to collect the interest or penalties provided for by this chapter on delinquent assessments and installments of assessments.

(2) Fails to enforce the collection of the assessments by the sale of the property. However, this subdivision does not apply to a municipal fiscal officer of a municipality that has adopted an ordinance under section 24(a) of this chapter.

(3) Otherwise fails to comply with this chapter.

(c) The surety on the municipal fiscal officer's bond is also liable to the extent of the bond.

As added by P.L.98-1993, SEC.8.

* * *

IC 36-9-37-8.5

Assessments; installment payments

Sec. 8.5. (a) With respect to assessments imposed after June 30, 2001, the municipal works board shall establish a procedure to permit owners of real property in the unit to elect whether to pay assessments in:

(1) ten (10), twenty (20), or thirty (30) annual installments; or

(2) a number of monthly installments that corresponds to ten (10), twenty (20), or thirty (30) annual installments.

(b) The municipal works board shall establish the timing of the election under subsection (a) to permit the municipal works board to structure the maturities of the principal of the bonds in a number of annual series that is consistent with the

installment periods elected by owners of real property under subsection (a).

(c) A person who elects to pay the person's assessment in installments under this section must, when directed by the municipal works board, enter into a written agreement stating that in consideration of that privilege the person:

(1) will not make an objection to an illegality or irregularity regarding the assessment against the person's property; and

(2) will pay the assessment as required by law with specified interest.

(d) The agreement under subsection (c) shall be filed in the office of the disbursing officer.

(e) The interest rate specified for the installments of the assessment may be equal to or greater than the interest rate on bonds issued under section 28 of this chapter.

(f) An assessment of less than one hundred dollars ($100) may not be paid in installments.

(g) If the property owner is not an individual, the election under subsection (a) must be made in the following manner:

(1) For a partnership, at least one (1) of the partners must sign the waiver and other instruments required for the election.

(2) For a corporation, the president or vice president must do all of the following:

(A) Sign the waiver and other instruments required for the election.

(B) File a certified copy of the resolution of the board of directors or trustees authorizing the president or vice president to execute those instruments on behalf of the corporation.

(3) For a church, a lodge, a charitable institution, or other organization, the person or persons acting on behalf of the organization must sign the waiver and other instruments required for the election, but only after being instructed to do so by a resolution adopted at a meeting of the organization called for that purpose.

As added by P.L.62-2001, SEC.4.

IC 36-9-37-9

Certification of assessment roll; liens

Sec. 9. (a) When the assessment roll for an improvement ordered by the works board of a municipality is finally approved, the assessment roll shall be certified to the municipal fiscal officer. The fiscal officer shall then collect the special assessments listed on the assessment roll.

(b) Each special assessment constitutes a lien against the property on which the special assessment is levied.

As added by P.L.98-1993, SEC.8.

* * *

IC 36-9-37-11

Assessment installments; interest

Sec. 11. If a municipal works board orders any of the following improvements and assessments are imposed after June 30, 2001, to pay for the improvements or to repay bonds issued under this chapter after June 30, 2001, each owner of property assessed for that improvement may elect to pay the owner's assessment in installments with interest as described in section 8.5(a) of this chapter:

(1) Streets.
(2) Alleys.
(3) Other paved public places.
(4) Lighting.
(5) For municipalities that own and operate a water utility, water main extensions from the water utility.
(6) Sanitary sewers.
(7) Emergency warning systems.

As added by P.L.98-1993, SEC.8. Amended by P.L.62-2001, SEC.5; P.L.45-2004, SEC.1; P.L.42-2006, SEC.2.

* * *

IC 36-9-37-19
Notice of default on installment payments

Sec. 19. (a) If a person defaults in the payment of a waivered installment of principal or interest of an assessment, the municipal fiscal officer shall mail notice of the default to the person. The notice must meet the following conditions:

(1) Be mailed not more than sixty (60) days after the default.
(2) Show the amount of the default, plus interest on that amount for the number of months the person is in default at one-half (1/2) the rate prescribed by IC 6-1.1-37-9(b).
(3) State that the amount of the default, plus interest, is due by the date determined as follows:
(A) If the person selected monthly installments under section 8.5(a)(2) of this chapter, within sixty (60) days after the date the notice is mailed.

(B) If the person selected annual installments under section 8.5(a)(1) of this chapter, within six (6) months after the date the notice is mailed.

(b) A notice that is mailed to the person in whose name the property is assessed and addressed to the person within the municipality is sufficient notice. However, the fiscal officer shall also attempt to determine the name and address of the current owner of the property and send a similar notice to the current owner.

(c) Failure to send the notice required by this section does not preclude or otherwise affect the following:

(1) The sale of the property for delinquency as prescribed by IC 6-1.1-24.

(2) The foreclosure of the assessment lien by the bondholder.

(3) The preservation of the assessment lien under section 22.5 of this chapter.

As added by P.L.98-1993, SEC.8. Amended by P.L.172-1994, SEC.2; P.L.45-2004, SEC.2; P.L.67-2006, SEC.16; P.L.113-2010, SEC.156.

IC 36-9-37-20

Collection of delinquent assessments; interest penalties

Sec. 20. (a) If any principal and interest, or an installment of principal and interest, is not paid in full when due, the municipal fiscal officer shall enforce payment of the following:

(1) The unpaid amount of principal and interest.

(2) A penalty of interest at the rate prescribed by subsection (b).

(b) If payment is made after a default, the municipal fiscal officer shall also collect a penalty of interest on the delinquent amount at one-half (1/2) the rate prescribed by IC 6-1.1-37-9(b) for each six (6) month period, or fraction of a six (6) month period, from the date when payment should have been made. *As added by P.L.98-1993, SEC.8. Amended by P.L.67-2006, SEC.17; P.L.113-2010, SEC.157.*

* * *

IC 36-9-37-22
Default on single installment

Sec. 22. Except as provided in section 22.5 of this chapter, the following apply if at least one (1) installment of an assessment is in default:

(1) The total amount of the assessment that remains unpaid is considered to be in default.

(2) The assessed property is subject to sale under sections 23 through 24 of this chapter to pay that amount.

(3) The assessment is subject to the:

(A) requirements and duties imposed;

(B) rights and remedies provided; and

(C) procedures available to the county treasurer;

for the collection of delinquent property taxes. *As added by P.L.98-1993, SEC.8. Amended by P.L.45-2004, SEC.3.*

IC 36-9-37-22.5
Preservation of assessment in default as a lien

Sec. 22.5. (a) The municipal fiscal officer and the municipal works board may jointly establish procedures allowing a municipality to avoid a sale,

on property that is not delinquent for property taxes, penalties, and other special assessments, that:

(1) is required under section 22 of this chapter; and

(2) would be conducted under IC 6-1.1-24;

by preserving an assessment that is in default as a lien against the property on which the assessment was imposed. A lien created under this section applies to the total assessment principal, interest, and penalties owed by the property owner on the date on which the municipality determines that the assessment is in default.

(b) Except as provided in subsection (c), an assessment preserved as a lien under this section shall be paid by the person liable for the assessment when ownership of the property is transferred.

(c) The following apply to an assessment preserved as a lien under this section:

(1) Additional penalties do not accrue to the lien after the date described in subsection (a).

(2) The procedures established under subsection (a) must specify when additional interest shall accrue to the lien after the date described in subsection (a).

(3) The lien must be recorded.

(4) The amount owed by the property owner must be paid by the person liable for the assessment before the final bond maturity date.

(d) When the person liable pays an assessment preserved as a lien under this section, the proceeds of the collection are subject to the same requirements as the proceeds of a sale conducted under section 24 of this chapter.

As added by P.L.45-2004, SEC.4.

IC 36-9-37-23

Certification of delinquent assessments

Sec. 23. (a) This section does not apply to a municipality if the legislative body of the municipality adopts an ordinance providing that this section does not apply to the municipality.

(b) Except as provided in subsection (d), before June 1 of each year the municipal fiscal officer shall certify to the county auditor a list of all delinquent waivered and nonwaivered assessments. The list must include the following:

(1) The name or names of the owner or owners of each piece of real property on which the assessments for principal and interest are in default.

(2) The description of each of those pieces of property as shown by the records of the county auditor.

(3) The total amount of principal, interest, and penalty due on each of those pieces of property.

(c) The county auditor shall immediately enter the list in a special duplicate and transmit the list to the county treasurer for collection.

(d) After the county treasurer receives the list, payments on the delinquent assessments shall be made only to the county treasurer and may not be accepted by the municipal fiscal officer. However, this subsection does not apply to payments from the county under section 24 of this chapter.

As added by P.L.98-1993, SEC.8.

IC 36-9-37-24

Delinquent assessments; sale of property

Sec. 24. (a) This section does not apply to a municipality if the legislative body of the municipality adopts an ordinance providing that this section does not apply to the municipality.

(b) After the county auditor receives the list of delinquencies from the municipal fiscal officer under section 23 of this chapter, the real property on the list is subject to collection by the county treasurer in the same way that delinquent property taxes are collected and may be sold in the manner that property is sold for taxes. The owners and purchasers of the property have the same rights and remedies as the owners and purchasers would have at a tax sale.

(c) The county auditor shall issue a county warrant for the principal, interest, and penalty to the municipal fiscal officer originally charged with the collection of the principal, interest, and penalty after the following:

(1) The collection of the principal, interest, and penalty.

(2) Settlement for principal, interest, and penalty by the county treasurer.

(d) This section does not require a county or any of the county's officers to include the amount of delinquent principal, interest, or penalty in a certificate of sale to the county.

(e) If a county or municipal officer fails to perform the officer's duties under this section or section 20(a) of this chapter, a person aggrieved by the failure may bring an action against the officer to compel performance.

As added by P.L.98-1993, SEC.8. Amended by P.L.172-1994, SEC.3.

IC 36-9-37-25

Procedures to avoid a foreclosure action

Sec. 25. (a) To avoid a foreclosure action on a special assessment, a municipality may:

(1) defer collection of the assessment under section 22.5 of this chapter; or

(2) accept a conveyance in satisfaction of the assessment from the owner of the assessed property.

(b) If there are bondholders other than the municipality holding bonds on the improvement for which the assessment was made, the municipality may do any of the following:

(1) Join with the other bondholders in accepting a conveyance of an undivided interest in the property.

(2) Cause a conveyance of the property to be made to a bank or trust company in the municipality and held under a trust agreement by the bank or trust company for the use and benefit of the municipality and the other bondholders.

(c) A conveyance under this section may be accepted by the municipality only if the head of the municipal legal department makes a written recommendation to the city executive or town legislative body that the conveyance be accepted.

As added by P.L.98-1993, SEC.8. Amended by P.L.45-2004, SEC.5.

* * *

IC 36-9-37-38

Overpayment of special assessments; refunds

Sec. 38. (a) If excess payments have been made and collected on special assessments for public improvements, the municipal fiscal officer shall, not later than thirty (30) days after the discovery of the overpayment, give notice of the amount of the overpayment by mail to the owner of record of the property on which the payment was made.

(b) When the municipal fiscal officer determines the amount of the overpayment and the person or persons to whom the reimbursement should be made, the fiscal officer shall issue a refund of the overpayment to the proper person or persons.

As added by P.L.98-1993, SEC.8.

* * *

IC 36-9-39
Chapter 39. Barrett Law Funding for Municipal Sewers

* * *

IC 36-9-39-15
Sewage works for use by property owners along street, alley, or other public place; requirements

Sec. 15. (a) The requirements listed in subsection (b) apply only if the municipal works board finds that the sewage works to be constructed:

(1) are intended and adapted only for local use by property owners along the line of the street, alley, or other public place on which the sewage works are constructed; and

(2) are not intended or adapted for receiving sewage from collateral sewers.

(b) The following requirements apply to the sewage works if the conditions of subsection (a) are satisfied:

(1) The abutting lots, parcels, and tracts of land shall be assessed primarily for the cost of the sewage works.

(2) The cost of the sewage works shall be primarily estimated according to the total number of lots abutting on the line of the works and served by the sewage works.

(3) The costs shall be primarily apportioned equally among all abutting lands or lots. However, adjustments shall be made as provided by section 16 of this chapter.

As added by P.L.98-1993, SEC.10.

IC 36-9-39-16

Sewage works for use by property owners along street, alley, or other public place; assessments; computation

Sec. 16. (a) The primary assessment for each lot abutting on and served by the sewage works shall be determined by dividing the estimated total cost of the sewage works by the total number of lots.

(b) The total number of lots shall be computed as follows:

(1) If all or any part of the sewage works is located within an area platted or to be platted, each lot abutting on and served by the sewage works as shown in the plat shall be included in the total number of lots.

(2) If all or any part of the sewage works is located within an area that:

(A) is unplatted;

(B) contains a residence on each parcel of land; and

(C) is subject to zoning restrictions that prevent an increase in the number of residences;

each parcel of land that is abutting on or served by the sewage works and that contains a residence shall be included in the total number of lots as if the parcel was a platted lot.

(3) Except as provided in subdivision (2), if all or any part of the sewage works is located in an unplatted area, the number of lots to be included in the total number of lots shall be determined by dividing:

(A) the total front footage of the property abutting on and served by the sewage

works within the unplatted area on either or both sides of the street, alley, or right-of-way in which the sewage works are located; by

(B) one hundred twenty-five (125) feet.

The result determined under clauses (A) and (B) shall be rounded to the nearest whole number.

(4) The front footage of property may not be used to determine the number of lots included in an unplatted area if the front footage:

(A) is not available for future development; or

(B) is restricted against usage because of:

(i) limited access; or

(ii) any other reasons.

(5) The total number of lots for a particular sewage works is the sum of the number of platted and unplatted lots as determined under subdivisions (1) through (4).

As added by P.L.98-1993, SEC.10.

IC 36-9-39-17

Sewage works for use by property owners along street, alley, or other public place; property abutting on two streets or one street and one alley; assessments; computation

Sec. 17. (a) If a platted lot or parcel of land:

(1) abuts on:

(A) at least two (2) streets or alleys; or

(B) one (1) street and one (1) alley; and

(2) has already been assessed for sewage works constructed for local use in any street or alley;

the works board shall take the previous assessment into account in making a subsequent assessment against the land under this section and sections 15 through 16 of this chapter.

(b) If the works board finds that:

(1) a lot, parcel, or tract of land included in a district, subdistrict, or zone cannot be reasonably connected with or served by the sewage works either directly or by collateral branches or extensions;

(2) the sewage works does not confer benefit on the property; or

(3) the benefit that may be conferred by the sewage works is less than the amount computed in the manner provided in this section and sections 15 through 16 of this chapter;

the works board may enter upon the primary assessment roll the actual amount, if any, found by the works board as the special benefit to the property.

(c) An amount credited, eliminated, or reduced shall be primarily apportioned over all the other property assessable for the sewage works, as the works board may find the other property to be benefited in addition to the amounts estimated and apportioned under section 16 of this chapter. If all of the amounts credited, eliminated, or reduced are not reapportioned upon the other property, a deficiency shall be assessed against the municipality.

As added by P.L.98-1993, SEC.10.

* * *

IC 36-9-39-21

Assessment roll; formulation; contents

Sec. 21. (a) After the contract for the construction of sewage works has been completed, the municipal works board shall make out an assessment roll for the property that is primarily assessed for the sewage works.

(b) The assessment roll prepared under subsection (a) must include the following:

(1) The name of the owner of each lot or parcel of land.

(2) A description of each lot or parcel of land.

(3) The total primary assessment against each lot or parcel of land, as determined under sections 15 through 19 of this chapter. The amount of the total primary assessment shall be listed opposite each name and description.

As added by P.L.98-1993, SEC.10.

IC 36-9-39-22

Assessment roll; finality of primary or preliminary assessments; notice of works, assessment roll, and hearing on assessments

Sec. 22. (a) The primary or preliminary assessments indicated on the assessment roll are considered the special benefits accruing to the land assessed and are final and absolute unless changed under sections 23 and 24 of this chapter.

(b) Immediately after the assessment roll is completed and filed, the municipal works board shall publish a notice in accordance with IC 5-3-1. The notice must do the following:

(1) Describe the general character of the sewage works.

(2) Describe the street, alley, or other public place on or in which the sewage works have been constructed.

(3) Describe the terminals of the sewage works.

(4) If the sewage works are intended to serve a district, describe the boundaries of the district benefited and to be assessed.

(5) State that the assessment roll, with:

(A) the names of the owners;

(B) descriptions of property to be assessed; and

(C) amounts of the preliminary or primary assessments;

is on file and may be inspected in the office of the works board.

(6) Establish the date and time for a hearing at which the works board will, at the works board's office, do the following:

(A) Receive and hear remonstrances against the amounts assessed on the assessment roll.

(B) Determine whether the lots and parcels of land have been or will be specially benefited by the sewage works in the amounts listed on the assessment roll.

As added by P.L.98-1993, SEC.10.

IC 36-9-39-23

Hearing on assessments; findings; modification of preliminary or primary assessments

Sec. 23. (a) At the hearing fixed under section 22 of this chapter, owners of assessed property may appear before the municipal works board and file

remonstrances against the assessments. The works board may continue proceedings from day to day, as necessary to hear the evidence concerning the assessments.

(b) The works board shall determine at the hearing whether the several lots and parcels of land primarily assessed are specially benefited in the amounts respectively assessed against the lots and parcels of land in the preliminary or primary assessment.

(c) The works board shall sustain or modify, in whole or in part, the preliminary assessment as indicated on the assessment roll, by confirming, increasing, or reducing the preliminary or primary assessment against all or part of the property described in the assessment roll. The decision of the works board must be based on the works board's findings concerning the special benefits received on account of the sewage works.

(d) The works board shall also determine at the hearing what part, if any, of the benefits resulting from the sewage works accrue to the municipality and shall be assessed against the municipality on the assessment roll.

As added by P.L.98-1993, SEC.10.

IC 36-9-39-24

Hearing on assessments; modification of assessment roll; delivery to fiscal officer

Sec. 24. The works board shall do the following:

(1) Complete the assessment roll and make a decision by modifying or confirming the assessment roll.

(2) Show the amount of special benefits opposite each name and description. The

works board shall show the amount of special benefit against the municipality if the works board finds that the municipality is specially benefited.

(3) Deliver the completed assessment roll to the municipal fiscal officer.

As added by P.L.98-1993, SEC.10.

IC 36-9-39-25

Hearing on assessments; finality of decision; appeals; effect of defective procedures

Sec. 25. (a) Except as provided in subsection (b). the decision of the works board concerning all benefits is final and conclusive on all parties.

(b) An owner of an assessed lot or parcel of land who has filed a written remonstrance with the board may appeal in the manner prescribed by IC 34-13-6. The appeal does not delay the delivery of the assessment roll to the municipal fiscal officer and does not affect the rights of any other property owner.

(c) If an assessment is reduced on appeal, the works board shall certify the correction to the municipal fiscal officer. The municipal fiscal officer shall then enter the proper amount of the assessment on the roll.

(d) The following applies if there is a defect in the assessment proceedings with respect to at least one (1) interested person:

(1) The defect affects the proceedings only to the extent that the defect affects the interest or property of the person or persons.

(2) Supplementary proceedings of the same general character as those described by this

chapter may be had to correct or supply the defect.

As added by P.L.98-1993, SEC.10. Amended by P.L.1-1998, SEC.219.

IC 36-9-39-26
Duties of fiscal officer

Sec. 26. When the assessment roll has been delivered to the municipal fiscal officer, the municipal fiscal officer shall discharge the same duties in respect to the assessments as are prescribed by the statutes concerning street, alley, and other improvement assessments in the municipality.

As added by P.L.98-1993, SEC.10.

* * *

APPENDIX B

CITY-COUNTY GENERAL ORDINANCE NO. 107, 2005

Sec. 671-22. Connection permits.

(d) Permit fees; refunds. The following permits and payment of the associated fees are required to make a connection to the city's sanitary or combined sewer system. The board of public works shall establish the amount of the following fees by regulation and may revise the amount of such fees but not more than once each calendar year:

(1) The building sewer permit inspection fee shall cover the costs of mandatory inspection by the division of compliance of the building sewer and its connection, and any reinspection that may be necessary because of remedial construction;

(2) The plan review fees shall cover the costs for the amount of time that is required for the division of compliance to administer and review plans submitted under this article for conformance with the department's standards and specifications;

(3) The administrative fee shall cover the department's costs related to administration, planning, and review for the sewer service agreement; and

(4) The connection fee of two thousand, five hundred dollars ($2,500) per EDU will be assessed for all new connections to the sanitary or combined sewer system at the time of acquiring a building permit. A new connection would include new sewer service or modification of an existing sewer service agreement; however, replacement or repair of an existing individual building sewer that does not increase EDU's would not constitute a new connection.

The permit fee paid under this article shall not be refunded upon and in instances where the permit was issued in error, either because it was not required by law, or because a permit for the same activity previously had been issued and was in force at the time the second permit was applied for and issued.

APPENDIX C

BOARD OF PUBLIC WORKS RESOLUTION NO. 101, 2005

A RESOLUTION FORGIVING BARRETT LAW ASSESSMENTS

WHEREAS, The Board of Public Works (Board) is authorized by Indiana Code (IC) 36-9-39 to administer 'Barrett Law Funding for Municipal Sewer' program under which the Board approves all Barrett Law projects within the City of Indianapolis – Marion County, including individual assessment amount per parcel, and

WHEREAS, The Barrett Law Funding for Municipal Sewer program may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems, and

WHEREAS, The Department of Public Works (DPW) has a proposed rate and fee increase package to the City-County Council for approval to continue to address there-capitalization, expansion, operation and maintenance, and regulatory requirements of the City's sanitary sewer system which was approved by the City-County Council on October 31, 2005

(Proposal No. 535 as amended) effective on January 1, 2006, and

WHEREAS, The financial model upon which Proposal No. 535 was based, considered the current assessments being made by participants in active Barrett Law projects as well as the future needs to eliminate leaking septic systems in all of the City of Indianapolis – Marion County in order to discontinue the use of Barrett Law Funding for Municipal Sewer program for the finance of sanitary sewers.

NOW, THEREFORE, BE IT RESOLVED that the Board of Public Works hereby forgive all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005 forward to the Department of Public Works via the Barrett Law Assessment Bureau.

ADOPTED this 7th day of December, 2005.

Board of Public Works

/s/
James A. Garrard, Chairperson

/s/
Kip Tew, Member

/s/
Roger Brown, Member

/s/
Gregory Taylor, Member

/s/
Sue Schalk, Member

ATTEST: /s/
Kimberly Frye, Board Secretary

APPROVED AS TO FORM AND LEGALITY:

/s/
R. Matt Senseny, Board Counsel
Assistant Corporation Counsel

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-161

In the Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a city's decision to forgive all outstanding balances related to a discontinued public works program violates the Equal Protection Clause because the city chose not to reopen closed transactions and refund payments already made before the effective date of the transition away from the discontinued program.

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

For decades, the City of Indianapolis financed the construction of sewers pursuant to an Indiana state law known as the "Barrett Law." The Barrett Law authorizes Indiana municipalities to finance neighborhood sewer improvements by imposing and collecting assessments on benefited homeowners following completion of a project. Each assessment constitutes a determination by the municipality that an affected homeowner was specially benefited by the sewer project in that amount. Homeowners are given the option of paying their assessment in a lump sum or in installments. Over the years, the City employed the Barrett Law method to finance hundreds of projects, and thousands of residents paid Barrett Law assessments in exchange for the benefit of a sewer. The Barrett Law method eventually proved to be politically unpopular, however, and in October 2005, as part of a sweeping overhaul of its sewer financing system, the City stopped relying on it. In conjunction with its abandonment of the Barrett Law approach, the City passed a resolution forgiving all outstanding Barrett Law balances as of November 1, 2005.

Petitioners are homeowners whose neighborhood received a sewer in 2003 as part of a Barrett Law-financed project and who, following the project's completion, paid their assessment in a single lump-sum payment. Two years later, after the City forgave all outstanding Barrett Law balances, petitioners demanded a refund of their Barrett Law payments, claiming that because of the forgiveness program, homeowners in their neighborhood who opted to pay in installments had, effectively, paid less for their sewer than petitioners. The City denied petitioners' request. Petitioners then sued, claiming, *inter alia*, a violation of the Equal Protection Clause. The trial court granted summary judgment for petitioners, Pet. App. 80a–81a, and the court of appeals affirmed, *id.* at 41a–78a. The Indiana Supreme Court granted transfer and reversed. *Id.* at 1a–40a.

A. The Barrett Law

Enacted in 1889, Indiana's Barrett Law "authorizes municipalities to provide or require public improvements and fund those improvements by levying special assessments against the benefitted properties." Pet. App. 3a. A sewer project financed under the Barrett Law begins with the passage of a resolution by the municipality's works board. Ind. Code § 36-9-39-3. After obtaining an engineer's estimate of the project's total cost, the board must then provide notice and conduct a hearing for "all interested persons," including "persons whose property is affected or will be affected by the proposed sewage works," on the question of "whether the special benefits that will accrue to the property to be assessed will be equal to

the estimated cost of the works." *Id.* § 36-9-39-4. That inquiry seeks to avoid improvements whose costs outweigh the benefits. The board must subsequently determine that the "benefits accruing to the abutting property are equal to the estimated cost of" the project, a finding that is "final and conclusive on all parties." *Id.* § 36-9-39-5(b). A contractor is then selected for the project and construction begins. *See id.* § 36-9-39-7.

To cover the costs of a Barrett Law sewer project, a municipality may levy assessments against benefiting properties. Ind. Code § 36-9-39-13. Properties are assessed "primarily for the cost of the sewage works." *Id.* § 36-9-39-15(b)(1). For assessment purposes, the costs of the sewer are "primarily estimated according to the total number of lots" abutting the sewer and "primarily apportioned equally among all abutting lands or lots." *Id.* § 36-9-39-15(b)(2)–(3). Each abutting lot's assessment is determined by "dividing the estimated total cost of the sewage works by the total number of lots." *Id.* § 36-9-39-16(a). If the board determines that the sewer's benefit to a particular property is "less than the amount" determined by the general assessment formula, it may reduce the preliminary assessment accordingly. *Id.* § 36-9-39-17(b).

After construction of the sewer is completed, the board prepares an assessment roll listing each affected property's respective preliminary assessment. Ind. Code § 36-9-39-21. Such assessments are "considered the special benefits accruing to the land assessed" unless modified following a public hearing. *Id.* § 36-9-39-22(a). The board must provide notice and a hearing to "[r]eceive

and hear remonstrances against the amounts assessed on the assessment roll" and to determine whether the listed properties "have been or will be specially benefited by the sewage works in the amounts listed" on the roll. *Id.* § 36-9-39-22(b)(6).

At the hearing, an owner may object to his preliminary assessment; the board, in turn, must determine whether each property on the roll is "specially benefited in the amount[] respectively assessed against" it. Ind. Code § 36-9-39-23(a)–(b). The board "shall sustain or modify, in whole or in part," each preliminary assessment; at all times, its decisions must be based on its findings "concerning the special benefits received" by each property. *Id.* § 36-9-39-23(c). Absent modification, the board confirms the assessment roll, which "[s]how[s] the amount of special benefits" accruing to each homeowner from the project, and it delivers the confirmed roll to the municipality's financial officer. *Id.* § 36-9-39-24. Homeowners who objected to their preliminary assessments may appeal their final assessments, but in all other respects, the board's decisions regarding assessments are "final and conclusive on all parties." *Id.* § 36-9-39-25.

Homeowners have several options for paying off the amount assessed through the elaborate Barrett Law process. They may pay off the entire amount in a single lump sum, or they may choose to pay in installments over ten, twenty, or thirty years, with interest. *See* Ind. Code §§ 36-9-37-6, -8.5, -11. If a property owner elects to pay in installments, the assessment "shall be collected in the same manner as other taxes." *Id.* § 36-9-37-6. Until fully paid, the assessment constitutes a lien against the property,

and the municipality may initiate foreclosure proceedings if even one installment is in default. *Id.* §§ 36-9-37-9(b), -22. Proceeds from assessments for a particular Barrett Law project "constitute a special fund" that may be used only for specific purposes, including payment of contractors or security and payment of bonds issued in relation to a project. *Id.* § 36-9-37-13.

B. The Brisbane/Manning Sewer Project

For decades, the City of Indianapolis used the Barrett Law to finance sewer improvements for residents. *See, e.g.*, *Indiano v. City of Indianapolis*, 269 N.E.2d 552, 553 (Ind. Ct. App. 1971); *Conley v. Brummit*, 176 N.E. 880, 881 (Ind. Ct. App. 1931). Between 1992 and 2005 alone, the City connected some 4,200 properties to sewers using the Barrett Law. Brendan O'Shaughnessy, *City's Sewer Policy Upsets Some Residents*, Indianapolis Star, Nov. 8, 2005, at B2. One of the literally hundreds if not thousands of projects over the years was the Brisbane/Manning Sewer Project, the project giving rise to this litigation.

In every respect, the Brisbane/Manning project was unremarkable and no different from countless Barrett Law projects that had preceded it. The project was intended to bring sewers to approximately 180 properties in Indianapolis' Northern Estates neighborhood. Pet. App. 3a–4a. In April 2001, the City informed affected homeowners of the intended project. Homeowners received notice of an upcoming informal meeting where Department of Public Works (DPW) staff would discuss the costs of the project and the

recommended assessment range. Homeowners were told that if the Public Works Board approved the assessment range, then "the per benefited lot assessments for this project will not exceed that range." J.A. 55–56.

On August 8, 2001, the Board adopted a resolution formally commencing the project. J.A. 66. At a public hearing on February 27, 2002, the Board estimated the total costs for the project as $2,393,802 and set a targeted assessment of $10,500 to $11,500 per property. *Ibid.* In a May 31, 2002, letter, the City informed homeowners of these developments, noting that "actual assessment[s]" would be determined at a final public hearing "after the completion of construction." J.A. 59–60.

Construction was completed in October 2003, at which time homeowners could connect to the new sewer line. J.A. 63–64, 70. In May 2004, the Board informed homeowners of a final public hearing to "close out" the Brisbane/Manning project. J.A. 69. At that hearing, homeowners were told, they would have an opportunity to be heard, following which the Board would set the final assessment amounts, *ibid.*; subsequently, homeowners would receive notices regarding their assessment and their options for payment, J.A. 70.

At the final public hearing on June 9, 2004, the Board heard from interested persons and set a final Barrett Law assessment of $9,278 per property, more than a thousand dollars below the lower end of

the initial assessment range.[1] The Board also set an interest rate of 3.5 percent for homeowners who elected to pay in installments. The Board confirmed the final assessment roll and transmitted it to the City's financial officer. J.A. 65–67. There is no indication that any homeowner appealed his assessment; accordingly, the Board's determination that each homeowner had been "specially benefited" from the sewer in the amount of $9,278 was final and conclusive.

Shortly thereafter, in July 2004, homeowners received formal notice of their assessment and their payment options. J.A. 45–46. Of the approximately 180 properties covered by the project, 142 homeowners elected to pay in installments: 47 chose the ten-year plan ($77.27 per month); 27 chose the twenty-year plan ($38.66 per month); and 68 chose the thirty-year plan ($25.77 per month). Those installment payments reflected a 3.5 percent interest rate, and were accompanied by a statutory lien on the properties. Owners of the remaining 38 properties made a single lump-sum payment. Pet. App. 4a & n.4.

C. The City's Discontinuance of Barrett Law Funding

Despite its long history of use by the City and other municipalities to fund sewer projects, the Barrett Law became unpopular in Indianapolis. Critics claimed that it permitted the City to "force[] homeowners with septic systems to pay the cost of

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[1] Several properties were subject to assessments below $9,278 based on unique features. J.A. 66–67.

hooking up to sewers or risk losing their property for not paying taxes," Brendan O'Shaughnessy, *Sewer Rate Proposal Is Mixed*, Indianapolis Star, Oct. 4, 2005, at B1, and that the assessments "create[d] considerable hardship" for some homeowners, David Rohn, *Mandated Sewer Hookups Can Carry Financial Drain*, Indianapolis Star, Mar. 13, 2001, at A1. *See also* Editorial, *Time to Hold Nose and Pay Pipe Fitters*, Indianapolis Star, Oct. 5, 2005, at A14 (referring to "the hated Barrett Law"). Coinciding with the increasing disdain for Barrett Law financing was a growing realization by elected officials that, for environmental and public health reasons, the City desperately needed to upgrade its sewer infrastructure—in particular, reducing the number of residential septic systems. *See, e.g.*, Matthew Tully & John Fritze, *Septic System Issue Bubbles to the Surface*, Indianapolis Star, Dec. 8, 2003, at A1.

Consequently, on October 31, 2005, the City-County council passed Ordinance No. 107, 2005, Proposal 535. Pet. App. 4a, 44a. The ordinance enacted a "sweeping plan" to "overhaul" the city's sewer financing system. Brendan O'Shaughnessy, *Sewer Plan is Expected to Get OK*, Indianapolis Star, Oct. 31, 2005, at B1. The plan, referred to as the Septic Tank Elimination Program (STEP), received "unanimous support from both parties." It eliminated reliance on the "much-reviled Barrett Law" and instituted a $2,500 flat fee for homeowners to connect to a sewer line. To fund these changes, the City increased monthly sewer rates and stormwater fees for all residents. In conjunction with its abandonment of reliance on the unpopular

Barrett Law, the City also agreed to "cover any outstanding Barrett Law debts." *Ibid.*; Pet. App. 5a & n.5, 15a n.10.

As such, on December 7, 2005, the Board of Public Works unanimously enacted Resolution No. 101, pursuant to which the Board "forg[a]ve all assessment amounts it established pursuant to the Barrett Law Funding for Municipal Sewer program due and owing from the date of November 1, 2005 forward." J.A. 71–72. In enacting the forgiveness program, the Board specifically noted that the discontinued Barrett Law program had "present[ed] financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems," as well as the fact that the new funding approach included a "rate and fee increase package" applicable to all City residents. J.A. 71. At the time Resolution 101 was enacted, there were more than forty Barrett Law projects of various vintages for which outstanding balances remained for those electing to pay in installments. Pet. App. 5a. Resolution 101 neither refunded any payments previously made—whether in installments or lump-sum payments—nor reopened any closed transactions.

D. Proceedings Below

1. Petitioners are owners of 31 of the approximately 38 properties included in the Brisbane/Manning sewer project who paid their Barrett Law assessments in a lump sum. Pet. App. 4a. In February 2006—over two years after construction of the Brisbane/Manning sewer was completed, and over a year and a half after the

project was formally "close[d] out," J.A. 69—petitioners, citing Resolution 101, requested a refund from the City for $9,278, *i.e.*, the full amount of the Barrett Law assessment each had paid. J.A. 49.

The City denied the request. In a letter to petitioners, James Garrard, the DPW Director, explained that Resolution 101, which forgave all outstanding Barrett Law balances as of November 1, 2005, was enacted "in response to" the sewer overhaul legislation, which "phas[ed] out" the City's use of the Barrett Law. J.A. 49–50. Garrard acknowledged that because the Brisbane/Manning project was closer in time to the effective date of the transition, petitioners might feel entitled to a refund of their payments. Nevertheless, he explained, "the fact that this was a recent use of [the] Barrett Law does not distinguish it from previous projects constructed using the same funding mechanism." J.A. 51. To reopen earlier transactions and refund petitioners' payments made before the effective date of the transition/forgiveness, as opposed to forgiving outstanding balances, "would establish a precedent of unfair and inequitable treatment to all other property owners" who had paid Barrett Law assessments in the past. *Ibid.*

Petitioners' letter invoked Ind. Code § 36-9-39-15, which requires that Barrett Law assessments be apportioned equally among the affected lots. Garrard explained that the Brisbane/Manning project fully complied with this provision, which governs only the assessment process, because each property "was assessed the same amount to finance th[e] project under a legally established process that the City utilized at the time." J.A. 50. Garrard

closed by noting that while the Board's choice of November 1, 2005, as the date to forgive outstanding balances might seem "arbitrary to [petitioners]," the City had to establish a date that would permit it to "move forward" with the new approach. J.A. 51.

2. Petitioners filed suit against the City and various agencies and officials (respondents here) in Marion Superior Court, alleging, *inter alia*, a violation of the Equal Protection Clause. J.A. 10–24.[2] Petitioners asserted that because of Resolution 101, their neighbors who had chosen an installment plan had effectively paid "a maximum of $1,215.22" for a new sewer, while they had paid $9,278 for the same sewer. J.A. 15. Petitioners alleged that the "application of Resolution 101" by the City therefore "denied the equal protection of the laws to the class of taxpayers who had already fully paid" their Barrett Law assessments, by "arbitrarily wiping out the liability" of those who had elected to pay by installments. J.A. 16. Petitioners contended that this "arbitrary classification of taxpayers" violated the Equal Protection Clause. J.A. 17. With two exceptions not relevant here, petitioners each sought a refund of $8,062.78—not the full amount of their initial assessment, but the difference between their lump-sum payment and the maximum amount paid by their neighbors whose had chosen installments (presumably, those who had opted for the ten-year installment plan). J.A. 15.

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[2] Petitioners also alleged violations of the Due Process Clause and provisions of the Indiana Constitution and Indiana statutes, claims no longer at issue. Pet. App. 7a.

Both parties moved for summary judgment. The trial court granted summary judgment for petitioners and entered judgment against the City for $380,914.16. Pet. App. 7a, 80a–84a.

3. The Court of Appeals of Indiana affirmed. Pet. App. 41a–78a.

As an initial matter, the court of appeals noted that petitioners were not challenging the 2004 assessments on their properties, the constitutionality of the ordinance overhauling the City's sewer system, or the "facial validity" of the forgiveness provision, Resolution 101. Pet. App. 53a. Instead, the "dispositive question" was whether the City's refusal to issue refunds to petitioners violated the Equal Protection Clause. *Id.* at 53a–54a. Acknowledging that rational basis review governed that question, *id.* at 54a–56a, the court concluded that the "most relevant" authority was this Court's decision in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989)—a case upon which petitioners had not even relied in their briefs. Pet. App. 24a n.14, 57a. The court of appeals also found "instructive" three state supreme court decisions purportedly holding that a municipality violates the Equal Protection Clause "when it forgives an outstanding assessment owed by some property owners while, at the same time, it refuses to refund an equivalent amount to similarly situated property owners who have already paid the same assessment in full." *Id.* at 58a–60a (citing *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), *State ex rel. Stephan v. Parrish*, 891 P.2d 445 (Kan. 1995), and *Richey v. Wells*, 166 So. 817 (Fla. 1936)).

Guided by those decisions, the court then purported to apply rational basis review to the City's decision not to issue refunds to petitioners, committing multiple legal errors along the way. Notwithstanding Resolution 101's broad application to multiple projects of various ages (as long as outstanding balances existed), it narrowly confined the "relevant classification in this case" to "all the Northern Estates property owners subject to the same July 2004 Barrett Law assessment." Pet. App. 61a. It repeatedly observed that it was "the City's burden to provide a rational basis" for its decision, rather than petitioners' burden to negate the existence of a rational basis. *See id.* at 63a & n.9, 70a. It believed that because the City had set forth findings in Resolution 101, it was "foreclosed from offering other subsequent explanations" supporting its decision. *Id.* at 67a. And it concluded that the City could not remedy the alleged equal protection violation by rescinding the forgiveness provision; instead, the City was "required by the Constitution" to provide refunds. *Id.* at 76a–77a.

The court of appeals denied the City's petition for rehearing. J.A. 6.

4. The Indiana Supreme Court granted transfer and reversed. Pet. App. 1a–40a.

The court agreed with the parties that rational basis review applied. Pet. App. 9a. Unlike the court of appeals, the Indiana Supreme Court thoroughly reviewed this Court's rational basis jurisprudence and concluded that, for a number of reasons, the City's actions did "not run afoul of the Equal Protection Clause." *Id.* at 9a–15a. The court noted

that the forgiveness program was designed to relieve middle- and low-income property owners from Barrett Law assessments, and "[p]roviding relief or support for citizens facing financial hardship is clearly a legitimate interest." *Id.* at 15a–16a. The City, moreover, could have reasonably believed that owners who had paid their assessments "were in better financial positions than those who chose installment plans," and, in any event, "eliminating tax burdens is clearly a rational way of eliminating financial hardship caused by the tax burden." *Id.* at 16a.

Furthermore, the court held, the City could have reasonably believed that "the benefits of simplifying sanitary sewer funding outweighed the effort of continuing a collection system for thousands of taxpayers, some of whom owed all, some a lot, and some only a little of their respective assessments." Pet. App. 18a. That was particularly true because preserving all outstanding assessments would have meant "not only maintaining such a collection system but sitting on the tax liens for up to 30 years." *Ibid.* And the fact that the City "chose to draw the line at November 1, 2005," was "a matter of discretion appropriately exercised by the City and the Board." *Ibid.*

The court also concluded that the City had a legitimate interest in "not emptying its coffers to provide refunds to those who had already paid their assessments." Pet. App. 19a. As the court explained, petitioners' assessments "were used to fund the Brisbane/Manning Project and had already been spent in constructing those sewers." *Ibid.* Petitioners "each paid for a sewer and received a

sewer, along with all the attendant public health benefits associated with sanitary sewers." *Ibid.* "This was *not* a case," the court observed, "in which [petitioners] were assessed for a local benefit and did not receive that local benefit." *Ibid.*

The court then rejected the arguments advanced by petitioners and the court of appeals. Rebuffing petitioners' reliance on "so-called 'class-of-one' * * * equal protection cases," the court observed that Resolution 101 "makes a broad classification on the basis of a common characteristic—outstanding Barrett Law balances." Pet. App. 20a, 24a. The court noted that Resolution 101 simply "distinguishes between property owners who had outstanding Barrett Law assessments on November 1, 2005, and property owners who did not." Furthermore, the resolution "does not limit the Barrett Law projects to which it applies but forgives *all* outstanding Barrett Law assessments, regardless of the particular project under which the assessments were levied." *Id.* at 23a. In addition, the court stressed, "it was not just Brisbane/Manning taxpayers who had paid their assessments in full who did not receive refunds; *no* taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid." *Ibid.* (emphasis added). That was the case for "thousands of taxpayers, some of whom had paid all, some a lot, and some only a little of their respective assessments." *Ibid.* The court also noted that, unlike many traditional class-of-one cases, there was "no evidence that the City's action was motivated by animus or ill-will toward [petitioners]" or any other

homeowners without outstanding balances. *Id.* at 24a.

The court also criticized the court of appeals' reliance on *Allegheny Pittsburgh* and its disregard of "other cases applying traditional rational-basis analysis." Pet. App. 29a. The court noted that in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), this Court deemed *Allegheny Pittsburgh* a "rare case," Pet. App. 27a (quoting 505 U.S. at 16), and that later decisions characterized it as a class-of-one case, *id.* at 28a (citing *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602–03 (2008), and *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

The court rejected petitioners' reliance on out-of-state decisions holding that purportedly similar actions violated equal protection. It concluded that petitioners' leading case, *Armco Steel*, *supra*, was "incorrect in its articulation of equal protection law and distinguishable on its facts." Pet. App. 30a. It found the others "unpersuasive," observing that "[a]ll but one of th[o]se cases considered challenges under state constitutions," rather than the federal Equal Protection Clause. *Id.* at 31a–32a. The remaining case, *Richey*, *supra*, cited "no authority" in finding an Equal Protection violation. *Id.* at 32a. The court also dismissed petitioners' reliance on *Cox v. City of Indianapolis*, No. 1:09-cv-435-WTL-DML, 2010 WL 2484620 (S.D. Ind. June 14, 2010), where the district court had ruled in favor of a class of City residents who, like petitioners, had fully paid their Barrett Law assessments and asserted an Equal Protection violation. *Id.* at *2. The Indiana Supreme Court noted that the *Cox* decision "relied almost entirely" on the court of appeals' opinion, which "did not apply

the appropriate equal protection standard." Pet. App. 34a n.22.

The court further corrected other flaws in the court of appeals' decision. It observed, for example, that the court of appeals erred in requiring the City to "come forth with proof" that its decision was rational. Pet. App. 16a. And it criticized the court of appeals' conclusion that the legislative findings in Resolution 101 precluded the City from providing other rational bases for its actions. *Id.* at 17a n.11. Because the court held that the City had not violated the Equal Protection Clause, it did not address whether, as a remedy, the City could rescind Resolution 101 rather than provide refunds.

Justice Rucker, joined by Justice Dickson, dissented. He agreed that rational basis review governed, but like the court of appeals, he believed that "when a legislature * * * state[s] a reason for a statutory classification, * * * it is inappropriate to consider other conceivable or even expressed rationales for the purpose of 'saving' an inadequately justified classification." Pet. App. 35a–36a (Rucker, J., dissenting). Accordingly, he confined his analysis to "the reasoning set forth in [Resolution 101's] text," which in his view "does nothing to explain why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments." *Id.* at 38a–39a.

SUMMARY OF ARGUMENT

Resolution 101 reflects an eminently rational approach for a government transitioning away from an unpopular program. The City recognized that the use of the Barrett Law to finance sewer projects had

become unpopular. In its place, the City adopted the STEP initiative, which it believed would provide a better mechanism for financing sewers, but which would also impose higher monthly fees on residents. The question then naturally arose concerning what to do about the vestiges of the Barrett Law program, in particular the outstanding balances and associated tax liens of residents in some forty Barrett Law projects. The City had three basic options. It could continue to collect the outstanding balances and maintain the associated tax liens for the nearly thirty years that it would take for payments under the discontinued regime to run their course. Alternatively, the City could refund every payment ever made under the program (or perhaps going back some arbitrary period like five or ten years) at enormous cost and administrative difficulty. Or the City could steer a middle course, forgiving the outstanding balances and eliminating the vestiges of the program going forward, while declining to reopen closed transactions or refund past payments.

The City's decision to choose the third of these options was perfectly rational. It draws on one of the basic divisions employed by every branch of government—the divide between prospective action and retroactively revisiting past transactions. That basic division is particularly appropriate in the context of a government transition away from an abandoned policy. The interests in making a clean break from the *ancien regime* and eliminating the vestiges of an unpopular program are more than sufficient to sustain the City's actions against constitutional attack under rational basis review.

But here the decision to forgive outstanding balances without reopening past transactions or issuing refunds made particular sense. STEP imposed higher monthly fees. The City could rationally decide that forcing citizens to make continuing Barrett Law payments on top of these additional monthly fees could cause financial hardship. The City could also rationally decide that reopening past transactions and issuing refunds would be an administrative nightmare. The City chose the one date for forgiveness that made eminent sense: the effective date of the transition to STEP. If it went back in time and refunded past payments, it would open up a host of questions about how far back in time to go, and which payments to refund. Those decisions in turn could run into serious logistical difficulties given the limits of recordkeeping and administrative capacity. The clean, simple alternative of only forgiving all outstanding balances made eminent sense.

The decision here is no different from countless government programs that announce forgiveness or amnesty for those who owe some obligation to the government. Those programs generally do not offer a refund to those who paid a penalty in full just before a program is announced or just before an effective date. While someone who, for example, pays a late parking ticket in full, with penalty, may feel some sense of unfairness if, due to an amnesty program, an even tardier fellow-parker has the penalty forgiven, there is no inequality of constitutional dimension. The impulse that produces tax forgiveness and parking ticket amnesty

is to be encouraged, not rendered unconstitutional if unaccompanied by refunds.

Petitioners would put a constitutional obligation on jurisdictions forgiving outstanding balances to provide refunds as well. They derive that principle from this Court's decision in *Allegheny Pittsburgh*. But that decision, which this Court severely circumscribed just three years later, is readily distinguishable. *Allegheny Pittsburgh* involved the aberrational application of an assessment system in which the local assessor deviated from the state's announced policy. There is no analog here. Petitioners suggest that the failure to provide refunds is unfaithful to the Barrett Law's requirement that initial assessments be equal. But that mixes apples and oranges. The initial assessments were equal here. The later decision to forgive outstanding balances without issuing refunds for past payments does not violate that inapposite state-law requirement. To the contrary, Resolution 101 addresses a situation not expressly contemplated by the Barrett Law and its requirement of equal assessments—namely, how to make a rational transition away from the Barrett Law after it had proven inadequate and unpopular. Resolution 101 provides for a perfectly rational transition, and nothing in *Allegheny Pittsburgh* is remotely to the contrary.

Petitioners' remaining arguments do not call into question the constitutionality of the City's decision to forgive outstanding balances without reopening past transactions or refunding past payments. They wisely abandon their previous reliance on inapposite class-of-one and state

supreme court cases. They ignore the myriad cases that emphasize that rational basis review is neither demanding nor limited to contemporaneous statements of legislative purpose. And there is no merit to their implicit premise that the only possible remedy for their claim is to provide refunds to all, rather than eliminate the prospective forgiveness. That argument only highlights the tenuous nature of petitioners' claim. They do not claim injury from having to pay a Barrett Law assessment; they claim injury from the relative good fortune of their neighbors whose outstanding balances were forgiven. Properly understood, that is no constitutional injury at all, but if government forgiveness of some is the source of the injury, then eliminating that forgiveness must surely remedy the injury. And that is what petitioners' argument invites: if the price of government forgiveness of outstanding balances is a requirement to reopen past transactions and refund past payments, then government forgiveness will become an endangered species.

ARGUMENT

I. THE CITY'S DECISION TO TRANSITION AWAY FROM RELIANCE ON BARRETT LAW FINANCING BY FORGIVING OUTSTANDING BALANCES BUT NOT REOPENING CLOSED TRANSACTIONS OR REFUNDING PAST PAYMENTS WAS EMINENTLY RATIONAL

Under well-established principles of rational basis review, the City's decision to forgive all existing Barrett Law balances as of November 1,

2005, but not to refund Barrett Law payments made before that date does not violate the Equal Protection Clause. Indeed, the City's decision is eminently rational and relies on one of the most basic dividing lines employed by all branches of government—the basic divide between prospective change and retroactively revisiting past transactions. The City certainly could have decided to maintain the vestiges of the abandoned financing plan for the next three decades while outstanding balances eventually were reduced to zero. But it was perfectly rational—indeed commendable—for the City to make a clean break and forgive the outstanding balances. In doing so, the City was not constitutionally obligated to go back and refund amounts previously paid under the program, whether recent lump-sum payments, payments by those choosing the ten-year option instead of the thirty-year approach, or otherwise. It certainly could have done so, but rational basis means having options. The option the City chose here—to draw a line between prospective forgiveness and retroactive refunds; between outstanding obligations and payments already made—was eminently rational and offends no principle of federal constitutional law.

A. Rational Basis Review Indisputably Governs the City's Actions

Petitioners have never disputed that rational basis review governs whether the City's actions violate the Equal Protection Clause. *See* Pet. App. 9a. Their opening brief, however, is tellingly devoid of even the most general discussion of this Court's considerable jurisprudence on what rational basis entails. That jurisprudence makes crystal clear that

the City's choice to forgive outstanding balances while not granting retroactive refunds offends no principle of constitutional law.

The Equal Protection Clause "does not forbid classifications" but "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger*, 505 U.S. at 10. Governments are generally "presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Ibid.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961)) (internal quotation marks omitted). Accordingly, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic"—which petitioners have never claimed—"the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Ibid.*; *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–41 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). This is not a high bar. A classification not subject to heightened scrutiny "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). So long as the question of rationality "is at least debatable," the challenging party "cannot prevail." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (internal quotation marks omitted).

The deferential nature of this review is no accident. Government is essentially an exercise in

continuous line-drawing. For courts to maintain their proper and properly-limited role, equal protection review in areas that do not implicate fundamental rights or a suspect class must be deferential. "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973) (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)) (internal quotation marks omitted). Rational basis review is thus "a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

One aspect of that deferential review is that the classification is "accorded a strong presumption of validity." *Heller*, 509 U.S. at 319. The burden is on "the one attacking the legislation" to "negative every conceivable basis which might support it." *Id.* at 320 (quoting *Lehnhausen*, 410 U.S. at 364) (internal quotation marks omitted). That is true "whether or not the basis has a foundation in the record." *Id.* at 320–21. Indeed, a government need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. Instead, a governmental choice "may be based on rational speculation unsupported by evidence or empirical data," and a classification "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller*, 509 U.S. at 320 (quoting *Beach Commc'ns*, 508 U.S. at 313). And because the government is "never require[d] * * * to articulate its reasons for

enacting" a law, it is "entirely irrelevant for constitutional purposes" whether "the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315.

Nowhere is the deferential nature of rational basis review more evident or critical than where the government "engage[s] in a process of line-drawing." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "[C]lassifying governmental beneficiaries" will "'inevitably require[] that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *Beach Commc'ns*, 508 U.S. at 315–16 (quoting *Fritz*, 449 U.S. at 179). But the "fact that the line might have been drawn differently * * * is a matter for legislative, rather than judicial, consideration." *Id.* at 316 (quoting *Fritz*, 449 U.S. at 179) (brackets and internal quotation marks omitted). Indeed, even if a classification is "both underinclusive and overinclusive," and the line drawn thus "imperfect," there is no violation of equal protection, since "'perfection is by no means required.'" *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960)). That is because "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations." *Heller*, 509 U.S. at 321 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69–70 (1913)) (internal quotation marks omitted). Accordingly, a challenged classification survives rational basis review "even when there is an imperfect fit between means and ends." *Ibid.* The "precise coordinates of the

resulting legislative judgment" are "virtually unreviewable." *Beach Commc'ns*, 508 U.S. at 316.

Rational basis review is "especially deferential" when classifications concerning taxation are at issue. *Nordlinger*, 505 U.S. at 11. The Court has emphasized that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983). Thus, within the bounds of rationality, "the Constitution grants legislators, not courts, broad authority * * * to decide whom they wish to help with their tax laws and how much help those laws ought to provide." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

B. The City Had a Rational Basis For Forgiving All Outstanding Barrett Law Balances Under Resolution 101

Throughout this litigation, petitioners have repeatedly insisted that they are not challenging their initial Barrett Law assessments, the City's transition from Barrett Law funding to STEP, or, most importantly, the facial validity of Resolution 101. *See, e.g.*, Pet. App. 53a; Br. 37, 44; Appellees' C.A. Br. 22–23. They claim only that the decision to forgive outstanding balances triggered a constitutional obligation to issue refunds.

Petitioners' concessions are well-taken. While the City certainly could have maintained the vestiges of the Barrett Law for the nearly thirty years it would have taken for all outstanding balances to be paid down, it was plainly rational to make a clean break and forgive all outstanding

balances. By any measure, the Barrett Law was deeply unpopular. As the City noted in the *Cox* litigation, "'[n]o one liked [the] Barrett Law—not the City officials, not the neighborhood organizations, not the general public.'" 2010 WL 2484620, at *1. Having decided to transition away from the reviled Barrett Law and toward STEP, the City could rationally decide to eliminate the remnants of the *ancien regime*. Doing so sends constituents an unequivocal message that reliance on the Barrett Law has ceased. It also avoids confusion and financial hardship on the part of residents asked to continue installment payments while simultaneously paying higher monthly rates under STEP. In short, there is a rational basis in making a clean break. The City's DPW director, James Garrard, made precisely this point in his deposition in *Cox*, stating that "the whole sort of approach to ending Barrett Law was to clearly end Barrett Law":

> We wanted a finite date to say: Look, we are now done with all aspects of Barrett Law. It was such a wildly unpopular program[.] * * * So our primary focus was: let's simplify this program, make it very clear that folks will pay one fee going forward, it's a constant fee across the City, and we're done. * * * So ending Barrett Law for us had to mean not just we're not going to use it going forward, but we would end all aspects of it, including collecting old Barrett Law fees. So we can clearly say to folks: We are out of the Barrett Law business.

Ex. C to Pls.' Supp. Mot. For Summ. J., at 45:7–46:2, *Cox*, No. 1:09-cv-435-WTL-DML (filed Jan. 4, 2010) [Dkt. 53-3] (deposition transcript of James Garrard).

The City's decision to forgive all outstanding Barrett Law balances also makes sense from the standpoint of administrative convenience. At the time the City transitioned to STEP, the City was collecting outstanding balances for at least forty Barrett Law projects, some of them relatively recent. Pet. App. 18a. As the Indiana Supreme Court recognized, absent forgiveness, the City would have had to "continu[e] a collection system for thousands of taxpayers" and maintain thousands of tax liens on affected properties. *Ibid.* Declining to forgive outstanding balances and liens would have kept the City in "the Barrett Law business" for nearly thirty years. By contrast, eliminating them, while not without fiscal impact, undoubtedly advanced the City's legitimate interest in a smooth regulatory and administrative transition from the discontinued framework to the new scheme. Indeed, DPW director Garrard stated in an affidavit that "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program" were one of the reasons for the passage of Resolution 101. J.A. 76. Maintaining those accounts, he continued, would "not benefit the taxpayers" and would "defeat the purpose of" the new program—"namely simplifying things." *Ibid.*

Finally, the prospective elimination of outstanding balances also rationally furthered the City's interest in minimizing the impact of the transition on middle- to lower-income residents. It

was certainly rational to conclude that the obligation to continue Barrett Law payments on top of the higher monthly sewer rates and stormwater fees associated with STEP would have a particularly harsh impact on lower-income residents. Again, that is borne out by Resolution 101 itself and Garrard's affidavit, which both refer to the "financial hardships" incurred by many middle- to lower-income residents subject to the Barrett Law. J.A. 71, 75. By eliminating the need to make continued installment payments, the City eliminated the possibility of a double burden on cash-strapped residents.

To be sure, not all residents with outstanding Barrett Law balances may qualify as middle- to lower-income, and the City could have means-tested its forgiveness program. But it was certainly under no federal constitutional obligation to do so. Rational basis review does not require a perfect means-end fit, and means-testing the forgiveness program would have been fatal to some of the City's other objectives, such as making a clean break from the "bad old days" of Barrett Law financing. In the real world, legislation is rarely the product of a single motivation, *see Fitzgerald*, 539 U.S. at 108–09, and for that reason, among others, the absence of a perfect fit between Resolution 101's particular concern with middle- to lower-income residents and its forgiveness of all outstanding balances is not fatal under rational basis review. *See, e.g.*, *Heller*, 509 U.S. at 321.

C. The City's Decision Not to Reopen Closed Transactions or Refund Barrett Law Payments Already Made Was Entirely Rational

Petitioners' concession that Resolution 101's forgiveness of outstanding Barrett Law balances is permissible is far more damaging than they acknowledge. Indeed, it is ultimately fatal to their claim. The Equal Protection Clause requires treating similarly situated individuals the same. But petitioners are not similarly situated to the residents who received relief under Resolution 101 for the simple and critical reason that petitioners had no outstanding balances. As anyone with an outstanding credit card balance can confirm, the difference between having an outstanding balance and being paid-in-full is a meaningful one. Petitioners were treated no differently from anyone else without an outstanding Barrett Plan balance, whether that balance had been paid in a lump sum or over installments.

What petitioners seek, then, is not equal treatment, but a constitutional rule that requires a jurisdiction that intends to forgive outstanding balances to reopen past transactions and provide refunds for payments already made. They propose a rule where the price of prospective forgiveness is retroactive refunds. The Equal Protection Clause does not work that way. The difference between outstanding balances and past payments is simply an application of the fundamental difference between prospective change and retroactivity. That line is not only rational, but one of the basic building blocks of government action. Petitioners would

replace that eminently sensible line with a constitutional refund obligation of uncertain scope that would deter governments at every level from prospective tax forgiveness—an impulse that should be encouraged, not constitutionally proscribed.

1. The City's decision to make Resolution 101 apply to outstanding balances and not to reopen past transactions and issue refunds for payments already made was eminently rational. It is simply an application of the basic divide between legislation that is prospective only and legislation that retroactively revisits past transactions. That basic divide is so rational that it gives rise to the presumption that legislation that is silent as to its temporal effect applies prospectively only. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 236–37 (1995). To be sure, when legislation imposes new burdens on past conduct, constitutional provisions like the Ex Post Facto clauses can affirmatively limit the government to prospective action. But what is sometimes constitutionally compelled does not become affirmatively irrational when the new law confers a benefit rather than imposes a burden. To the contrary, a law that, for example, confers tax forgiveness or parking ticket amnesty can rationally apply only prospectively and honor the finality interest in taxes already paid and transactions already closed. Indeed, when it comes to judicial decisions, this Court has recognized that the interest in finality is of constitutional dimension. *Id.* at 218–19, 240. The legislature's interest in not reopening past transactions is surely at least rational.

The Court has long acknowledged finality as a legitimate justification for line-drawing,

notwithstanding the potential for perceived unfairness. Thus, for example, if the Court announces a new constitutional rule, a criminal defendant whose case is still on direct review may enjoy its benefits, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), but another criminal defendant whose conviction was already final may only do so under the very limited circumstances of *Teague v. Lane*, 489 U.S. 288 (1989). *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). That is so even if the two defendants were indicted on the same day and for the same crime; even if the rule would aid the second defendant more; and even if the first defendant's case is nonfinal only because of frivolous appeals the second defendant elected to forgo. Similarly, this Court's decision in *Plaut* meant that a securities plaintiff who pursued a frivolous appeal in the wake of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), would benefit from Congress' constitutionally valid extension of the statute of limitations in pending cases, while a comparable litigant who dropped the case in light of *Lampf* could not constitutionally have his finally adjudicated claim revived. *See* 514 U.S. at 214, 240.

This is not the unconstitutional treatment of similarly situated individuals, because whatever their other similarities, they are not similarly situated in the one way that counts: timing. That result may seem unfair on the surface, but a line has to be drawn somewhere, and the line between final judgments and pending cases, like the line between past payments and outstanding balances, is a perfectly rational place to draw the line. Governments need particular flexibility in

transitioning from one policy to another. For that reason, this Court and lower courts have rejected equal-protection-based challenges to "grandfather clauses" or other policies that treat two parties differently based on timing considerations related to a change in government policy. *See, e.g.*, *Dukes*, 427 U.S. at 305 (holding that "gradual approach" to imposing ban on pushcarts was not "constitutionally impermissible"); *Bell v. Dupperault*, 367 F.3d 703, 707 (7th Cir. 2004) (holding that changed policy rendered two otherwise identical applications submitted at different times "not similarly situated"). *Cf.* U.S. Const. art. II, § 1, cl. 4 (limiting presidential eligibility to natural born citizens and citizens "at the time of the Adoption of this Constitution"); U.S. Const. amend. 22, § 1 (exempting current officeholder from new presidential term limit).

The basic rationality of a line differentiating between outstanding balances and payments already made is only underscored by the difficulty of fixing any other line. Indeed, had the City decided to provide refunds to *some* homeowners who made payments before the transition, like petitioners, but not *all* such homeowners, it would presumably have a more difficult time justifying its decision. For example, the City could have allowed a refund for all payments made in the last five years; but that limit would have been far more arbitrary than its decision to provide no retroactive refunds at all and only forgive outstanding balances. To be sure, even a five-year retroactivity period could be defended as rational (as the line has to be drawn somewhere),

but that only confirms the rationality of the City's decision.

The logic of petitioners' position would seem to extend at least so far as to require a refund for any homeowner who paid in full while others in the same project continue to have an outstanding balance. Just as those who made a lump-sum payment may envy those who stretched their payments out over ten years, those who paid in full after ten years may envy those who stretched payments out over twenty years, and so on. Indeed, the phenomenon is not limited to those who paid in full. A Brisbane/Manning homeowner who elected to pay over ten years paid $50 more per month than a neighbor choosing the thirty-year option and may feel disadvantaged by the relatively greater forgiveness extended to the latter. And, of course, even someone who fully paid Barrett Law assessments decades earlier may still feel disadvantaged relative to those who receive any degree of forgiveness.

This concern was not lost on this City. DPW Director Garrard informed petitioners that granting a refund to them but not others would be "unfair and inequitable" to "all other property owners who ha[d] also paid Barrett Law assessments." J.A. 51. In other words, once the line between past payments and outstanding balances is abandoned, there is no logical stopping point for the refunds. Petitioners' trial counsel even conceded as much during the summary judgment hearing: when asked by the court whether petitioners' theory would "open[] the floodgates for other litigation of the same kind" by "people who have paid in the past," counsel

answered that the court was "correct." C.A. App. 416–17. The *Cox* litigation further bears this out; one of the plaintiffs seeking a refund there fully paid off his Barrett Law assessment in December 2000—five years before Resolution 101 was passed. *See* Ex. B to Pls.' Supp. Mot., *supra* [Dkt. 53-2] (affidavit of Harvey Shannon, Jr.).[3]

Particularly absent any meaningful limit on the number and scope of potential Barrett Law refunds, the City's decision to forgive all outstanding balances while granting no refunds for payments already made avoids two equally vexing and inescapable problems. First, it would have been fiscally challenging to issue refunds since, under the Barrett Law, homeowners' payments had been committed to special funds designed to pay the costs of the very improvements from which those homeowners had benefited, including contractor and debt service costs. Ind. Code § 36-9-37-13. The Deputy City Controller confirmed as much in an affidavit in *Cox*. *See* Ex. C to Defs.' Supp. Cross-Mot. For Summ. J. at 2 ¶ 9, No. 1:09-cv-435-WTL-DML (filed Feb. 4, 2010) [Dkt. 57-3] (affidavit of Charles White) (stating that

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[3] At the summary judgment hearing, when pressed to identify any limiting factor that would prevent the anticipated torrent of claims, petitioners' counsel could only suggest "statute of limitations problems." C.A. App. 417. But that cannot be correct. Resolution 101—and its failure to grant retroactive refunds while forgiving outstanding balances—is the source of petitioners' constitutional claim. The statute of limitations could not possibly begin to run before Resolution 101's enactment and might not run until a requested refund was denied. *See, e.g.*, *Wallace v. Kato*, 549 U.S. 384, 391 (2007); *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009).

"Barrett Law funds collected prior to the forgiveness [resolution] were retained in a special fund and were used to pay the bond debt on the sanitary sewer construction projects"). Thus in contrast to a situation where certain outstanding general tax obligations are forgiven (which itself would be wholly rational), here the payments were attributed to specific projects and, by law, could only be spent—if they had not already been spent—on costs related to those projects.

Second, it would have been immensely difficult from an administrative standpoint for the City to have issued Barrett Law refunds to homeowners who had previously made payments. At the time Resolution 101 was enacted, there were over forty Barrett Law projects where homeowners had outstanding balances. Pet. App. 5a. The City had utilized the Barrett Law for decades; between 1992 and 2005 alone, the City connected some 4,200 properties to sewers using Barrett Law financing, and between 1996 and 2005, the City "received approximately $17,000,000 in Barrett Law payments," Ex. C to Defs.' Supp. Cross-Mot., *supra*, at 1 ¶ 6. The City no longer even had records of Barrett Law assessments and payments from before the early 1990s. *Id.* at 3 ¶ 14. To provide refunds (or even accurately assess the fiscal impact of the refunds), therefore, the City would have had to review records for thousands of homeowners across hundreds of different projects—if those records even existed anymore. It would have had to arrange for payments from non-Barrett Law sources, since funds were committed to and spent on Barrett Law projects as they were undertaken. And it would

have had to address innumerable other difficult issues—for example, whether homeowners were entitled to interest from the time they had made their payments, and if so, at what rate. These concerns are flatly contrary to the City's intended goal of being "done with all aspects of [the] Barrett Law" and "out of the Barrett Law business" upon passage of Resolution 101. The City accordingly acted well within the bounds of rationality in declining to provide refunds to petitioners and instead drawing a clear line between outstanding balances and past payments.

2. In an apparent attempt to sidestep the well-established principles of rational basis review that support the City's decision not to refund any Barrett Law payments made before Resolution 101's effective date, petitioners repeatedly accuse the City of a variety of impermissible classifications. At times, they accuse the City of "discriminat[ing] between taxpayers who delayed full payment of their assessments and those who paid in full." Br. 38; *see also id.* at 7, 32, 39, 49, 52. At other times, they contend that the City discriminated between "early vs. late payers." *Id.* at 40. At still other times, they claim that the City discriminated between "petitioners and their similarly situated neighbors." *Id.* at 33; *see also id.* at 9, 11, 22, 32. These various formulations miss the critical point: petitioners are not similarly situated to neighbors with outstanding balances. The very fact that petitioners affirmatively needed to seek a refund, while their neighbors simply had their outstanding balances forgiven without any further action on their parts,

underscores this fundamental division, which gives rise to a perfectly rational distinction.

Resolution 101 draws no distinction, other than a temporal one that looks to whether there were outstanding balances on Resolution 101's effective date. Resolution 101 forgave *all* outstanding Barrett Law balances due on November 1, 2005—regardless of the specific project to which they related, the particular neighborhood involved, how large or small a balance was, or how many installments were left to be paid. Likewise, the City has never refunded *any* Barrett Law payments made before that date—again, regardless of the specific project to which they related, the particular neighborhood involved, how large or small the payments were, or whether the payments were made by installment or lump-sum amounts. As the Indiana Supreme Court observed, "it was not just the Brisbane/Manning taxpayers who had paid their assessments in full"—*i.e.*, not just petitioners—"who did not receive refunds." Pet. App. 23a. Rather, "*no* taxpayers in any of the 40-plus Barrett Law projects received any refunds of the amounts they had paid, including those who had paid some but not all of their installments." *Ibid.* (emphasis added). In every material respect, both in forgiving *all* outstanding balances and in refusing to issue *any* refunds of prior payments, the City has treated all similarly-situated parties the same at all times. "Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (quoting *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979)). That is plainly the case here.

The only distinction the City *has* drawn is to declare an effective date of the forgiveness program of November 1, 2005, waiving all outstanding balances as of that date and refusing to refund any payments made before that date. While that effective date, like virtually any effective date, may have a disproportionate effect on someone who submitted a payment right before the deadline, that is not an unfairness of constitutional dimension. Any time the government forgives any payment or grants amnesty for anyone, there will be someone who has just paid a tax or penalty in full. But far from producing a constitutional violation, such an exercise of governmental line-drawing is perhaps the paradigmatic example of state action warranting deference under rational basis review. *See, e.g., Beach Commc'ns*, 508 U.S. at 315–16. Indeed, notwithstanding the wide latitude afforded to the City in selecting an effective date, it chose arguably the *least* arbitrary date possible—one day after passage of the legislative overhaul to which Barrett Law forgiveness was indisputably tied.

At its core, petitioners' claim reduces to the contention that the Equal Protection Clause forbids a forgiveness program that operates only prospectively. But that cannot possibly be the law. Otherwise, countless such programs operating at the local, state, and federal levels would be called into constitutional doubt. For example, the District of Columbia recently offered an amnesty program under which, beginning August 1, 2011, drivers could pay overdue parking and moving violation tickets without incurring the usual penalty for late payment (a doubling or more of the fine). *See* Nikita

Stewart, *DMV Offers Amnesty For Overdue Tickets*, Wash. Post, July 28, 2011, at B5. Without doubt, countless motorists had sent in their double payments in the days and weeks before the announcement; nevertheless, the District offered "no refunds" for such drivers. *Ibid.* Scores of other municipalities have instituted similar programs. *See, e.g.*, Melanie D. Scott, *Pay Parking Tickets Now and Save Big*, Detroit Free Press, June 19, 2011, at A11; Fran Spielman, *Amnesty Raises $7 Mil., Now Boots Are Coming*, Chi. Sun-Times, Mar. 4, 2009, at 6.

Likewise, California has enacted tax amnesty programs that "allow[] individuals and corporations owing income or sales taxes to pay up without facing financial penalties," without any indication that those who paid such penalties before the start date are entitled to refunds. Evan Halper & Dan Morain, *State Reaps $3 Billion in Overdue Taxes*, L.A. Times, Apr. 8, 2005, at B3. And the federal Internal Revenue Service has established programs allowing taxpayers with "undisclosed foreign accounts" voluntarily to disclose such accounts, thereby "avoid[ing] substantial civil penalties and generally eliminat[ing] the risk of criminal prosecution." Internal Revenue Service, Voluntary Disclosure: Questions and Answers (May 6, 2009), *available at* tinyurl.com/VDfaq. If the IRS has already "initiated a civil examination," however, the taxpayer is not eligible for the program. *Ibid.*

To be sure, each of the foregoing programs results in some unfairness to those whose relevant conduct preceded the program's announcement or effective date. The relatively-scrupulous and

modestly-tardy District parker may chafe at seeing his less scrupulous and tardier neighbor avoid a fine. But none of this amounts to a constitutional violation or a constitutional obligation for the District to provide refunds to all if it chooses to grant amnesty to some. As long as the government is even-handed about applying the effective date, there is simply no constitutional issue implicated. It is perfectly rational for a government to apply a forgiveness program prospectively, and the Court should resist petitioners' invitation to transform unlucky timing into a constitutional violation.

Relative to most individuals who fall on the wrong side of an effective date or amnesty deadline, moreover, petitioners are poorly positioned to claim unfairness. Under the Barrett Law, each petitioner's $9,278 assessment was based on the actual costs of the sewer project and constituted a conclusive determination that each petitioner was specially benefited in that amount. Ind. Code §§ 36-9-39-23(a)–(b), -25. In exchange for paying that assessment—which they never challenged as excessive or improper—petitioners received precisely the benefit they were promised: a new sewer system. Petitioners are no different from thousands of City residents who, for decades, paid a Barrett Law assessment in exchange for a sewer valued at that amount.

Petitioners' claim is thus not a product of petitioners' own injury, but wholly a product of petitioners' dissatisfaction with the fact that some of their neighbors benefited from the government's forgiveness. Absent that act of government generosity, petitioners would suffer no injury

whatsoever, since they got exactly what they paid for. By dint of timing and the City's decision to make a clean break from the Barrett Law, some of petitioners' neighbors got something of a windfall. To be sure, those homeowners were fortunate—just as a criminal defendant on direct review is fortunate when this Court announces a new rule that benefits him but not his co-defendant whose conviction is final, and just as a parking scofflaw is fortunate when a city enacts an amnesty program relieving him of hundreds of dollars in penalties his neighbor paid for the same offenses. But envy does not a constitutional violation make.

3. Neither this Court nor any other federal court has ever suggested, much less held, that a government violates the Equal Protection Clause when, as here, it forgives outstanding balances but does not reopen past transactions by refunding payments already made. Such a ruling would serve as a powerful deterrent to a wide range of government initiatives involving forgiveness of penalties, amnesty programs, and other acts of grace. It would be surprising if the same document that establishes the pardon power prevents such acts when they are prospective only. It would be unfortunate as well. Such government impulses should be encouraged—not deemed unconstitutional because the forgiveness extends only to "outstanding balances" and not to payments already made.

As noted, governments at the local, state, and federal level routinely engage in forgiveness or amnesty programs involving everything from parking tickets to tax deficiencies to other violations of the law. *See* Jane Prendergast, *Ticket Skippers*

Get Amnesty—Until June, Cincinnati Enquirer, May 10, 2011 (describing municipal amnesty program covering past-due bills for "emergency medical runs, summer day camps, barricading unsafe buildings and other fees"). These programs are mutually beneficial to both governments and constituents. In some circumstances, governments are able to raise much-needed funds. One recent IRS amnesty program involving offshore bank accounts, for example, "allow[ed] the United States Treasury to collect at least half a billion dollars in unpaid taxes." David Kocieniewski, *Amnesty Program Yields Millions More in Back Taxes*, N.Y. Times, Sept. 15, 2011, at B9. That justification does not always apply when, as here, a government transitions from one policy to another, but in those circumstances the revenue-raising justification is supplanted by the virtues of making a clean break from the past program and avoiding payments that may be viewed as duplicative. *See* pp. 26–29, *supra*. Constituents, in turn, avoid the very burden that the forgiveness program was designed to eradicate—be it a payment, a penalty, or even a criminal prosecution. Here, the benefit was quite clear as the City not only forgave outstanding Barrett Law balances but removed liens on affected properties.

Those benefits to both governments and constituents are put at risk by the rule petitioners advocate. Few governments would ever launch such programs if they face the possibility of compelled refunds or other benefits to a potentially limitless class of individuals who would claim to be "similarly situated" to the benefited individuals, but for an accident of timing. No municipality would ever

forgive penalties for late parking tickets if it were required to refund all penalties previously paid. And, here, all five members of the DPW Board attested that they would not have voted for Resolution 101 had the City been required, as a result, to refund all Barrett Law payments made before the effective date. *See* Ex. D–H to Defs.' Supp. Cross-Mot., *supra* [Dkts. 57-4 to 57-8].

If the price of government forgiveness is forced refunds for payments previously made, then government forgiveness programs will become an endangered species. That outcome is neither prudent nor compelled by law. The Equal Protection Clause is not offended by a wholly rational distinction between, on the one hand, forgiving outstanding balances and, on the other hand, reopening past transactions and refunding payments already made.

II. PETITIONERS' ARGUMENTS THAT THE CITY LACKED A RATIONAL BASIS FOR REFUSING TO REFUND THEIR BARRETT LAW PAYMENTS ARE UNAVAILING

A. Petitioners' Reliance On *Allegheny Pittsburgh* Is Misplaced

Petitioners principally rely (Br. 22–36) on *Allegheny Pittsburgh*, in which this Court held unconstitutional the peculiar assessment practices of the Webster County, West Virginia tax assessor. 488 U.S. at 338. According to petitioners, their case is "on all fours" with *Allegheny Pittsburgh*. That is a bold claim considering that petitioners did not even rely on that case in the lower courts, *see* Pet. App. 24a n.14; C.A. App. 18–43, 377–93; Appellees' C.A.

Br. 7–25, and this Court has essentially limited it to its highly aberrational facts. It is also incorrect. Not only is *Allegheny Pittsburgh* readily distinguishable, but petitioners' reliance on it reflects the precise mistake they repeatedly charge (erroneously) the City with making—namely, it confuses the initial assessment process and the later decision to forgive outstanding balances. *Allegheny Pittsburgh* involved the assessment process, an aspect of the Barrett Law process petitioners do not challenge, and it has nothing to do with the obligation to issue refunds for past payments.

The facts and holding of *Allegheny Pittsburgh* are unusual but uncomplicated. For over ten years, the Webster County assessor, "apparently on her own initiative," had assessed the petitioners' properties at levels dramatically higher than comparable surrounding properties. 488 U.S. at 339, 344–45. The resulting disparities were stark, with one property assessed at 35 times the value of a comparable property, and an estimate that it would take 500 years for valuations to equalize. *Id.* at 341–42. None of this was pursuant to a conscious policy choice by the state; instead, the assessor "fashion[ed] [her] own substantive assessment policies independently of state statute"—namely, by deciding that recently conveyed properties would be assessed on the basis of purchase price, a practice inconsistent with the State tax authority's guidance. *Id.* at 338, 345. The result of that "aberrational enforcement policy," *id.* at 344 n.4, was that petitioners suffered from the "intentional systematic undervaluation by state officials of comparable property in [the] County," constituting an equal

protection violation, *id.* at 346 (internal quotation marks omitted). The "aberrational" deviation underscored the Court's holding, as it expressly reserved judgment about the validity of a state's conscious decision to adopt a differential valuation scheme. *Id.* at 344 n.4.

From that modest case and its modest holding, petitioners seek to draw a broadly applicable principle of equal protection law. *Allegheny Pittsburgh*, petitioners contend, stands for the proposition that there must be "a plausible basis, judged in relation to the background policy choice the State had made, for the taxing authority to impose significant inequality among otherwise similarly situated property owners." Br. 26. In this case, they claim, the "background policy choice" was "equality among neighbors," *id.* at 26, 30, from which the City "wildly departed" when it forgave all outstanding Barrett Law balances but refused to refund any prior Barrett Law payments, *id.* at 32. (quoting *Engquist*, 553 U.S. at 603) (internal quotation marks omitted).

Petitioners' effort to recast *Allegheny Pittsburgh* suffers from multiple defects. As an initial matter, *Allegheny Pittsburgh* addressed discriminatory action in the context of property assessments. Petitioners concede, however, that they are not challenging their assessments. Br. 37. Rather, as they repeatedly take pains to point out—while chiding the City and the Indiana Supreme Court for purportedly failing to grasp the difference—they are challenging the City's subsequent decision not to refund their Barrett Law payments. *See, e.g.*, *id.* at 38, 39, 44. That is an entirely different state action

from the assessment determinations at issue in *Allegheny Pittsburgh*.

What is more, petitioners are attempting to mix and match the state's policy in the assessment process (equality) with the results of the separate forgiveness resolution (forgiveness for outstanding payments only) to generate the kind of inconsistency in *Allegheny Pittsburgh*. That will not work. It was critical to this Court's decision in *Allegheny Pittsburgh* that the assessor's valuation process deviated from the avowed state policy for the valuation process itself. Nothing in *Allegheny Pittsburgh* remotely suggests that governmental action fully compliant with a state law addressing assessments constrains subsequent, distinct governmental action regarding whether to forgive outstanding payments as part of a transition away from an old system. Here, to the extent Indiana state law required equal assessments, it was fully complied with.[4] But nothing in state law, let alone the federal Constitution, requires transplanting the equal assessment requirement to the separate context of deciding whether a forgiveness policy for outstanding balances should extend to refunds for prior payments. To use the parking analogy, an amnesty program that did not refund past payments

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[4] The Barrett Law does *not* require that homeowners, even those in the same project, be "treated equally." It merely provides that the "costs" of a sewer "shall be primarily apportioned equally among" affected properties. Ind. Code § 36-9-39-15(b)(2)–(3). The statute thus speaks only of requiring equal assessments among homeowners in the same project—nothing more. That is precisely what occurred in this case, as petitioners do not dispute. Br. 31, 48.

would not violate a statutory requirement that all tickets and penalties be assessed at an equal $50 amount, nor would it violate the Equal Protection Clause.

To the extent petitioners attempt to read *Allegheny Pittsburgh* as announcing some form of "rational basis-plus," that reading is completely inconsistent with a host of this Court's decisions suggesting that, if anything, governments have particular latitude in drawing classifications in the tax process. *See* pp. 25–26, *supra*. It is also completely inconsistent with this Court's decision three years later in *Nordlinger v. Hahn* confirming that *Allegheny Pittsburgh* was a narrow, factbound decision, not a revolution in Equal Protection jurisprudence. In *Nordlinger*, the Court addressed the issue it had reserved in footnote 4 of *Allegheny Pittsburgh*—*viz.*, the validity of a state initiative expressly adopting a policy of acquisition-value assessment. *See Nordlinger*, 505 U.S. at 5. The result was "staggering" differences in tax burdens for comparable properties. *Id.* at 6–7. The Court upheld the scheme against an equal protection challenge after confirming the applicability of the ordinary principles of rational basis review and concluding that the law rationally furthered multiple legitimate interests. *See id.* at 11–14.

In so doing, the Court rejected the petitioner's appeal to *Allegheny Pittsburgh*. It acknowledged that the assessment practices in both cases "resulted in dramatic disparities in taxation of" comparable properties. *Nordlinger*, 505 U.S. at 14. But the Court distinguished *Allegheny Pittsburgh* by emphasizing the aberrant practices of the county

assessor in that case: there was not "any indication" there that the assessor's "unequal assessment scheme" was driven by any reasonable policy, unlike the initiative at issue in *Nordlinger*. *Id.* 14–15. *Allegheny Pittsburgh*, the Court concluded, was "the rare case" under rational basis review "where the facts precluded any plausible inference" that the state action was driven by a legitimate interest. *Id.* at 16.

Nordlinger is instructive in several respects. First, it repeatedly refers to the "assessment scheme" at issue in *Allegheny Pittsburgh*, *see* 505 U.S. at 14–15, further confirming the disconnect between the state action there (assessment) and here (denial of refunds) and the impropriety of mixing and matching policies from one context to the other. Second, it establishes that "dramatic disparities in taxation" on comparable properties are not sufficient to make out an equal protection claim. *Id.* at 14. Third, and most significantly, it emphasizes the peculiar facts and extremely narrow holding of *Allegheny Pittsburgh*, describing it as a highly unusual case turning on the rogue assessor's systematic, intentional undervaluation. The disjunction between the stated assessment policy and the assessor's practices was both highly aberrational and critical; it was as if a state had adopted a flat tax and some local authorities had, for years, collected a graduated tax.[5] That is precisely

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[5] Of course, even in that case, it is not obvious why the aberrational efforts of the local tax authorities would violate the federal Constitution, as opposed to merely violating state law. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992) (Thomas, J., concurring in part and concurring in the judgment). While

how *Allegheny Pittsburgh* has been understood by lower courts and commentators, including the Indiana Supreme Court here. *See, e.g.*, Pet. App. 28a; *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1211 (10th Cir. 2006) (stating that "*Allegheny Pittsburgh* speaks to long-standing policies that produce systematic inequality"); Robert C. Farrell, *The Equal Protection Class Of One Claim:* Olech, Engquist, *and the Supreme Court's Misadventure*, 61 S.C. L. Rev. 107, 120-21 (2009) (observing that in *Nordlinger*, the Court "effectively limited the holding of *Allegheny Pittsburgh* to its facts").[6]

Finally, as even petitioners admit, their test is satisfied so long as there was a "plausible basis" for the government's purportedly differential treatment. Br. 26. For *Allegheny Pittsburgh* to be reconciled with the rest of the Court's equal protection

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there is no need to overrule *Allegheny Pittsburgh* here because it is so readily distinguishable, petitioners' creative efforts and the confusion sowed in the lower courts have proven Justice Thomas prescient in predicting that *Allegheny Pittsburgh* was a problematic and unworkable precedent even on its narrow facts. *Ibid.*

[6] Notably, criticism of *Allegheny Pittsburgh* is not in short supply. *See, e.g.*, *Nordlinger*, 505 U.S. at 18 (Thomas, J., concurring in part and concurring in the judgment); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1197 (9th Cir. 2002) (describing *Allegheny Pittsburgh* as "without substantial analysis"); William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 Fla. State U.L. Rev. 451, 496–97 (2010) (describing *Allegheny Pittsburgh* as a "muddled opinion" and an "outlier case"); John H. Ely, *Another Spin On* Allegheny Pittsburgh, 38 UCLA L. Rev. 107, 108–11.

jurisprudence, a "plausible basis" is simply a rational one. And as explained, there are manifold plausible and eminently rational justifications for the City's actions here. *See* pp. 26–37, *supra*.

B. Petitioners Do Not Otherwise Defend The Reasoning Of The Court Of Appeals Or The Dissent Below

Curiously, apart from following the court of appeals' suggestion that *Allegheny Pittsburgh* is highly relevant, petitioners do not employ or defend any of the reasoning found in the decisions below that support them. And they barely acknowledge the arguments they actually made before the lower courts. There is good reason for petitioners' reticence: all of the arguments they previously made are inconsistent with settled precedent, and the decisions below supporting them are riddled with errors.

For example, both the court of appeals and Justice Rucker's dissent cited *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959), for the proposition that, as the court of appeals put it, "when the text of a law specifically declares its purpose, the law leaves no room to conceive of any other purpose for its existence." Pet. App. 65a (brackets and internal quotation marks omitted). Because the City had "made findings and declared its purpose in" Resolution 101, the court of appeals believed the City was "foreclosed from offering other subsequent explanations" for its conduct in the context of rational basis review. *Id.* at 67a; *see also id.* at 72a. Justice Rucker likewise remarked that "when a legislature does state a reason for a

statutory classification, * * * it is inappropriate to consider other conceivable or even expressed rationales." *Id.* at 35a–36a (Rucker, J., dissenting).

But it is hornbook law that rational basis review does not work this way. Any conceivable rational basis, whether expressed contemporaneously or not, suffices. An enacting authority is "never require[d] * * * to articulate its reasons for enacting" a law, *Beach Commc'ns*, 508 U.S. at 315 (citing *Fritz*, 449 U.S. at 179), and this Court has never suggested, much less held, that the mere fact that legislation sets forth findings or purposes automatically precludes consideration of other justifications or rationales. *Cf. Fitzgerald*, 539 U.S. at 108–09. If the law were otherwise, governments would have every incentive to remain mum concerning their findings and motivations, which would hardly facilitate either good government or judicial review. Nor does *Allied Stores* suggest otherwise; as the Indiana Supreme Court properly observed, in that case the Court merely noted that when legislation expressly declares a *suspect purpose*, a government cannot later attempt to disclaim that rationale by advancing a different one. 358 U.S. at 529–30 (citing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)); Pet. App. 17a n.11. That is assuredly not the case here, and petitioners do not seriously contend otherwise.

The court of appeals also pointed to out-of-state decisions. *See* Pet. App. 29a–33a, 59a–60a. Petitioners likewise begin their argument with the bold assertion that, other than the Indiana Supreme Court, "every state supreme court to address the issue" has held that the Equal Protection Clause "prohibits tax-forgiveness measures that favor

taxpayers who delayed full payment over those who promptly paid their tax assessments in full." Br. 21. But the four decisions they cite are neither explained nor ever mentioned again. The reason is obvious: they are utterly inapplicable to this case. In *State ex rel. Stephan v. Parrish*, the "sole issue" was whether a state law violated the state constitution; the court cited no federal law. 891 P.2d at 448. So too in *Perk v. City of Euclid*, 244 N.E.2d 475 (Ohio 1969). In *Richey v. Wells*, decided well before the Court's modern rational basis review jurisprudence, the court simply declared, absent citation to authority, that the challenged provision "transcend[ed] the limits of both state and federal provisions of organic law on the subject of equal protection." 166 So. at 819. And as the Indiana Supreme Court properly explained, *Armco Steel Corp. v. Department of Treasury* was "incorrect in its articulation of equal protection law and distinguishable on its facts." Pet. App. 30a–31a.

Finally, before the lower courts, petitioners "primarily rel[ied] on * * * so-called 'class-of-one' cases." Pet. App. 20a. Before this Court, petitioners have largely abandoned that approach in favor of misplaced (albeit creative) reliance on *Allegheny Pittsburgh*. The closest petitioners come is to fault the Indiana Supreme Court for supposedly "suggest[ing] * * * that *Allegheny Pittsburgh* is irrelevant because that case was supposedly a 'class-of-one' case, whereas this case is not." Br. 35. But that just underscores that petitioners view their current *Allegheny Pittsburgh*-based claim as distinct from a class-of-one case. In any event, whether *Allegheny Pittsburgh* is viewed as a precursor to a

class-of-one claim or as simply a one-off case in light of *Nordlinger*, *see* Pet. App. 28a–29a, the result is the same. Petitioners have abandoned the arguments they made below and focused on *Allegheny Pittsburgh*, a readily distinguishable decision that cannot possibly carry the weight petitioners place on it.

C. Petitioners' Remaining Contentions Are Unfounded

Petitioners' remaining arguments attempt to pick away at various statements by the Indiana Supreme Court and various rationales for the City's conduct, hoping to induce death by a thousand cuts. Br. 36–56. But that scattershot approach does not undermine the rationality of the City's actions.

Petitioners repeatedly attempt to preempt the City's rational justifications for refusing to refund their Barrett Law payments by contending in various formulations that "the City has admitted that the only interest advanced by its decision to withhold refunds was its interest in keeping petitioners' money." Br. 40–41; *see also id.* at 37, 40, 46, 50, 56. They base these assertions on two passing statements in the City's Brief in Opposition: the first that "all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended," Br. in Opp. 6, and the second that "[petitioners'] solution of additional refunds would accomplish the same goals, but would have cost the city millions of additional dollars as a result," *id.* at 11.

These isolated remarks are entirely accurate, but do not carry anywhere near the significance

petitioners ascribe to them. The first simply reflects the reality that in transitioning away from the Barrett Law, the City could have made a clean break by not only forgiving outstanding balances, but refunding past payments as well. The second simply captures the reality that going beyond the forgiveness of outstanding balances to refunding past payments, potentially going back to the City's first use of Barrett Law financing, would have been considerably more expensive and prohibitively so. *See* pp. 34–37, *supra*. None of this is remarkable, let alone fatal to the City's position. This Court has often remarked that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). There are always competing concerns and constraints, and one of the most obvious is limited financial resources. That does not mean that when a legislature recognizes that it cannot pursue its objectives at all costs and draws a line, the only justification for drawing the line in that place is financial savings. To the contrary, legislatures operating with limited financial resources routinely draw lines that do not fully achieve their objectives, but draw the line in a place that otherwise makes sense. In the context of transitioning away from an abandoned policy, a decision to eliminate the vestiges of the program without reopening every transaction under the old regime is a perfectly sensible place to draw the line in a world of limited resources.

Nor is it correct for petitioners to insist that the City's interest was "in keeping petitioners' money." Br. 41. It bears repeating that upon payment, "petitioners' money" was allocated to a special fund

statutorily restricted to paying certain costs associated with the very sewer that the City had provided to petitioners in exchange for those payments. The City was not sitting on an enormous pot of petitioners' money; it was legislating in the face of severe fiscal restraints and drew the line at the most sensible place—forgiving outstanding balances without refunding previous payments. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990) (observing that governments "have a legitimate interest in sound fiscal planning"); *Lyng v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988).

Petitioners also contend that "administrative convenience" does not provide a legitimate basis for the City's refusal to deny them refunds. Br. 44–45. That is wrong both factually and legally. Petitioners claim that "it is difficult to imagine a case in which the administrative burden could be lighter." *Id.* at 44. But that ignores that petitioners are not the only parties entitled to refunds under their theory. The obligation would extend at least to similarly situated homeowners in other projects and could extend well beyond. The exact administrative burdens are difficult to pinpoint because the metes and bounds of petitioners' novel theory are imprecise, but the burdens are real. And, as a matter of law, petitioners are simply wrong to contend that avoiding administrative burdens is not a valid basis for legislation under rational basis review; the Court has long held otherwise. *See, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 711–12 (1986); *Mathews v. Lucas*, 427 U.S. 495, 509–10 (1976).

Petitioners spend ten pages (Br. 46–56) responding to the Indiana Supreme Court's single statement that "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." Pet. App. 16a. Petitioners attack this sentence on the ground that having made a lump-sum payment is a poor proxy for someone's overall "financial position[]." Whatever the truth of that proposition, having paid in full is a fair, if inexact, proxy for the aspect of a resident's "financial position" that was most relevant to the City in passing Resolution 101—namely, the ability of someone to pay both ongoing Barrett Law obligations and higher monthly fees under STEP. Obviously, those with no outstanding Barrett Law balances were in a better "financial position" in terms of liquidity to pay the higher monthly fees than those facing the new fees and the prospect of paying off outstanding balances. In all events, the constitutionality of Resolution 101 does not turn on this lone remark; ample independent rational bases support Resolution 101.

Finally, petitioners are incorrect to suggest, as the court of appeals concluded, that if the City's failure to provide refunds following Barrett Law forgiveness constitutes a violation of the Equal Protection Clause, the City must provide refunds rather than rescind forgiveness. *See* Pet. App. 75a–77a. This remedial question obviously does not arise unless petitioners' constitutional claim succeeds. But if the federal Constitution really does put a jurisdiction to the choice of either forgiving outstanding balances and refunding past payments

or forgiving nothing at all, there is no reason that the only constitutionally permissible remedy is the former.

In erroneously holding otherwise, the court of appeals again relied on *Allegheny Pittsburgh*. But there the Court merely rejected the proposition that an equal protection violation is alleviated if the government "imposes on him against whom the discrimination has been directed the burden of" establishing equalization. 448 U.S. at 346. That is a far cry from holding that a government cannot remedy an equal protection violation by *itself* rescinding the discriminatory conduct or eliminating the improper classification. In fact, this Court has "never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 738 (1984). To the contrary, "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment." *Id.* at 740 (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931)). That result "can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.*; *see also Wiesmueller v. Kosobucki*, 571 F.3d 699, 702 (7th Cir. 2009) (Posner, C.J.) (stating that "[l]eveling down is a permissible form of compliance with a command to end unequal treatment").

In this case, petitioners claim that they were treated unequally when the City forgave the outstanding Barrett Law balances of their neighbors (and many others) but did not refund the past

Barrett Law payments they (or anyone else) had already made. If that is an inequality of constitutional dimension, eliminating the forgiveness program rectifies that purportedly unequal treatment no less than refunding petitioners' payments, and the City should be afforded the former option to equalize the allegedly disparate treatment. Indeed, when remedying equal protection violations, "a remedial outcome consonant with the [government's] overall purpose is preferable." *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 153 (1980). Here, every member of the DPW Board has indicated that he or she would have preferred not to pass Resolution 101 at all rather than pass it but refund prior payments to homeowners, *see* p. 44, *supra*—an intent that should be honored should a violation be found.

Of course, the foregoing only highlights the anomaly of petitioners' constitutional claim. Petitioners' injury does not flow from being cheated out of some promised government benefit. They received the sewer they paid for. Their entire injury stems from the relative good fortune of their neighbors who were the beneficiaries of the government's understandable—indeed, admirable—desire to make a clean break from an abandoned policy and not saddle residents with continuing obligations under the old law. Such a "constitutional injury" could be "remedied" by eliminating the neighbors' good fortune, but there is simply no constitutional injury here in the first place. The City could have refunded every payment ever made under the old program, but doing so would have been infeasible. Instead, the City drew an eminently

sensible line using a principle underlying the actions of every branch of government. The vestiges of the discarded program were eliminated prospectively, but past payments and closed transactions were left undisturbed. There is simply nothing improper, let alone unconstitutional, about that commonsense decision.

CONCLUSION

The judgment of the Indiana Supreme Court should be affirmed.

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REPLY BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,

Respondents.

On Writ Of Certiorari
To The Indiana Supreme Court

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REPLY BRIEF FOR PETITIONERS

More than seven years after passing Resolution 101, respondents still search in vain for a rational basis for requiring petitioners to pay 30 times more than their neighbors, when state law guaranteed that such burdens would be borne "equally." The real reason remains obvious: It was more expedient to draw an arbitrary line than to pursue even "rough equality" among similarly situated taxpayers. That impulse is precisely what the Equal Protection Clause forbids.

Respondents' brief is largely devoted not to identifying reasons for their conduct, but rather to tacit arguments that no real reason is required. Like the court below, respondents defend at length the decision to discard the Barrett Law, but that says nothing about why petitioners received no refund while their neighbors received 90-97% forgiveness. Respondents say that governments must draw lines, but that does not explain why this line was drawn so arbitrarily. They observe that Resolution 101 applies "evenhandedly" to installment-plan payers, but that begs the question whether it was rational to deny petitioners a similar benefit. Any of these non-answers would condone even the most blatantly discriminatory tax treatment.

In *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), this Court followed a long line of cases, unanimously rejected the "anything goes" philosophy of taxation, and held that a State's explicit declaration of equality cannot be jettisoned on a municipality's whim. Respondents claim that *Allegheny Pittsburgh* applies to "nothing

more" than tax "assessments," but that makes as much sense as saying it applies only to coal deposits. Respondents' assertion that the gross inequality imposed by Resolution 101 "fully complied" with state law's promise of equality is fanciful. So is their reading of *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992), which *reaffirmed* rather than eviscerated *Allegheny Pittsburgh*.

When respondents purport to identify specific justifications for their refusal to issue refunds, they offer still more misdirection. Saying that Resolution 101 is "prospective" merely describes—but does not justify—it, and even that label is misplaced. The Barrett Law makes clear that assessments are final and fully payable regardless of the payment method chosen. The "administrative convenience" rationale is no more persuasive here than it was in *Allegheny Pittsburgh*. And respondents' claim that they already spent petitioners' money is, as in any tax case, no answer at all.

Finally, respondents urge an approach to rational-basis review that is subtly but dangerously wrong: that a proffered basis is "plausible" if it is "rational"—without regard to the statutory and factual context of the case. This Court rejected that proposition in *Nordlinger*, when it reaffirmed *Allegheny Pittsburgh*. It is one thing to say that authorities need not articulate a particular reason in advance and that courts should not take sides in policy disputes. It is different to *know*—here, from the City's own mouth and the unambiguous legislative scheme—that a proffered basis had nothing to do with the challenged action. Rational-basis review need not be overly searching, but it is not blind to reality.

I. THE CITY'S REASONS FOR ABANDONING THE BARRETT LAW AND FOR FORGIVING UNPAID ASSESSMENTS ARE IRRELEVANT TO THE QUESTION PRESENTED

Respondents' lead argument is a vigorous defense of the decision to "forgive all outstanding balances" under the Barrett Law. Resp. Br. 26-27. Respondents say they sought a "clean break" from the "*ancien regime*." *Id.* at 27. They reiterate that continuing to collect outstanding Barrett Law balances would have been administratively inconvenient. *Id.* at 28. And they assert—for the first time—that forgiveness was necessary to avoid making installment payers pay higher monthly sewer fees under STEP as well as their monthly Barrett Law assessments. *Id.* at 29.

That is all beside the point. The question is not the rationality of abandoning the old funding mechanism or of forgiving money owed. The question is whether the City had a rational basis for discriminating against homeowners who paid their assessments in full.

Respondents' focus on the forgiveness decision demonstrates the misunderstanding that pervades their brief. The equal-protection inquiry is, intrinsically, comparative. "[T]he fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." *Allegheny Pittsburgh*, 488 U.S. at 346. What matters is whether the government had a rational basis for treating similarly situated taxpayers vastly differently. For the same reason, it does not suffice that petitioners "got exactly what

they paid for"—a sewer hookup. Resp. Br. 42. The crux of the constitutional violation is that, despite an explicit promise of equality, petitioners paid 30 times more than their neighbors for the same benefit. Petitioners' claim thus cannot be dismissed as merely "envy," *ibid.*, of other taxpayers.

Williams v. *Vermont*, 472 U.S. 14 (1985), illustrates that point. The State there had a rational basis for taxing automobile owners to fund road improvements. But the constitutional question was whether the State had a rational basis for imposing that burden on some—but not all—groups of automobile owners. It didn't, this Court held, because "[t]he purpose of the statute would be identically served, and with an identical burden, by taxing each" group similarly. *Id.* at 24. So too here, as respondents have repeatedly acknowledged. Br. in Opp. 6, 11; Resp. Br. 54, 55.

Respondents nevertheless suggest that withholding refunds from petitioners was proper because "there is a rational basis in making a clean break." Resp. Br. 27. That assertion begs the constitutionally relevant question. A legislature's choice to engage in "line-drawing," *id.* at 25, is not in and of itself a justification; the line must be *rationally* drawn. See, *e.g.*, *Quinn* v. *Millsap*, 491 U.S. 95, 107-108 (1989) (unanimously striking down, on "rationality review," state law that limited eligibility for an appointment to those owning real property).

That is true even when that line is based on "timing." In *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), this Court overturned as irrational a tax-exemption statute that distinguished between veterans who established residence before

and after a specific date. It was irrelevant that the State sought to "draw a line" based on timing because the line drawn had "no rational relationship to one of the State's objectives." *Id.* at 619.

The "line-drawing" cases respondents cite (at 25-26) are not to the contrary. The government classifications were upheld because the government had a rational basis for drawing the line where it did, not simply because it professed a desire to draw one somewhere. *E.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 106 (1979) (retirement-age distinction between Foreign Service officers and other civil servants was rational because of unique "risks connected with having older employers in the Foreign Service"); *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550-551 (1983) (tax statute distinguishing between veterans' organizations and other charities was rational because of unique contributions of veterans).

II. THE CITY LACKED A RATIONAL BASIS FOR DISCRIMINATING AMONG NORTHERN ESTATES HOMEOWNERS

A. Respondents' Efforts To Avoid Constitutional Scrutiny Are Unavailing

Before turning to their *post hoc* justifications for the City's discrimination, respondents again try to avoid the question. First, they argue that the Equal Protection Clause is not even implicated because "petitioners are not similarly situated to the residents who received relief under Resolution 101." Resp. Br. 30. "The very fact that petitioners affirmatively needed to seek a refund, while their neighbors simply had their outstanding balances forgiven without any further action," respondents say, proves that the two

groups are not similarly situated. *Id.* at 37. Respondents further assert that Resolution 101 applies "evenhandedly to all" because it treats all installment payers the same (by providing them relief) and it treats all those who paid in full the same (by denying them relief). *Id.* at 38 (quoting *Vacco* v. *Quill*, 521 U.S. 793, 800 (1997)).

This Court has rejected that circular logic. "[T]he fact that all those not benefited by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated." *Williams*, 472 U.S. at 27. "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966).

Nor is it rational to penalize those who must "seek a refund" while their neighbors get a 90-97% tax reduction through inaction. Resp. Br. 37. In *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869, 872 (1985), out-of-state insurance companies had to "seek a refund" for past taxes (or invest in state securities to obtain a lower tax rate), whereas in-state companies paid lower taxes "without any further action on their parts." Resp. Br. 37. That difference did not shield the discrimination from constitutional scrutiny.

B. Respondents Cannot Distinguish *Allegheny Pittsburgh* and *Nordlinger*

As we explained (Pet. Br. 23-30), this Court held unanimously in *Allegheny Pittsburgh* that, when a State has declared taxpayers to be similarly situated and subject to equal tax burdens, it must actually achieve "rough equality in tax treatment." 488 U.S. at 343. *Nordlinger* confirmed that core holding but made clear that a State's explicit, *ex ante* selection of a different taxation philosophy was not impermissible simply because it resulted in disparities among taxpayers. Thus, a State's determination at the outset that certain taxpayers are—or are not—similarly situated made all the difference. When respondents get around to addressing *Allegheny Pittsburgh* and *Nordlinger*, Resp. Br. 44-51, they misread those precedents.

1. It is not novel to analyze *Allegheny Pittsburgh* as turning on the State's background policy of equality in taxation. Despite respondents' claim (at 46) that doing so "recast[s]" that "modest case and its modest holding," this Court recently described *Allegheny Pittsburgh* the same way. In *Engquist* v. *Oregon Dep't of Agriculture*, 553 U.S. 591, 602 (2008), the Court examined *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000), and cases cited in *Olech*—including *Allegheny Pittsburgh*. "What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures * * * could be readily assessed." 553 U.S. at 602. "In *Allegheny Pittsburgh*," the Court continued, "the applicable standard was market value, but the county departed from that standard in

basing some assessments on quite dated purchase prices." *Id.* at 603.

Respondents next note that *Allegheny Pittsburgh* involved only "the assessment process" and claim it therefore "has nothing to do with the obligation to issue refunds for past payments." Resp. Br. 45. But *Allegheny Pittsburgh*'s holding has no such microscopic boundaries; instead, the Court reaffirmed "the constitutional requirement" of attaining "*a rough equality in tax treatment* of similarly situated property owners." 488 U.S. at 343 (emphasis added). When it comes to "property assessment and taxation schemes," this Court later reaffirmed in *Engquist*, "[w]e expect such legislative or regulatory classifications to apply 'without respect to persons.'" 553 U.S. at 602 (quoting 28 U.S.C. § 453).

Respondents claim that *Allegheny Pittsburgh* does not apply because there is no "inconsistency" between Indiana law and Resolution 101: The former, they say, promised equality with respect to *assessments* and "nothing more." Resp. Br. 47 & n.4. That assertion resurfaces repeatedly in their brief (at 20, 45, 46, 47, 49) and is worth debunking.

The Barrett Law requires that "[t]he costs [of the project] shall be primarily apportioned equally." Ind. Code. § 36-9-39-15(b)(3). It specifies methods for reducing a parcel's assessment if it would not receive an equal benefit. See *id.* § 36-9-39-17. But equal burdens for equal benefit remain the norm, and there is no other statutory mechanism for adjusting homeowners' equal burdens—certainly not based on whether a taxpayer elects to pay in installments.

Instead, the law provides that "the municipal fiscal officer *shall* collect and enforce the special assessments" without mention of the payment method chosen. Ind. Code § 36-9-37-4 (emphasis added). It prescribes mechanisms to ensure that installments are fully paid. Installment payers "must, when directed by the municipal works board, enter into a written agreement" promising not to contest the assessment and to "pay the assessment as required by law with specified interest." *Id.* § 36-9-37-8.5(c). A lien attaches to the property. *Id.* § 36-9-36-40, -43; *id.* § 36-9-37-9(b). And the statute explicitly states that installment payers enjoy no special privilege concerning collection: "*If a property owner elects to pay the property owner's assessments in installments, the assessment shall be entered for collection on the improvement duplicate and* ***shall be collected in the same manner as other taxes.***" *Id.* § 36-9-37-6 (emphases added).

Furthermore, Article 10, Section 1 of the Indiana Constitution declares that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation." See Pet. Br. 31 (quoting same). Respondents do not address that provision. None of the nine Indiana state judges who examined state law below—even the three Indiana Supreme Court justices who ruled for respondents—read it to require anything less than full equality.

If anything, the departure from state law here is *more* extreme than in *Allegheny Pittsburgh*, because here specific statutory provisions declare that the purported distinction (election of an installment plan) does not place taxpayers on special footing. In *Allegheny Pittsburgh*, there was no similar

instruction; in fact, the statute *required* assessors to use recent sales data in establishing a property's fair market value. See Brief of Respondent 26, *Allegheny Pittsburgh* (No. 87-1303), 1988 WL 1025749 (citing W. Va. Code § 11-4-8).

2. Respondents rely on the result in *Nordlinger*, but overlook portions of the Court's reasoning that contradict their theory. Respondents seize (at 49) on *Nordlinger*'s reference to "the 'assessment scheme' at issue in *Allegheny Pittsbugh*," suggesting that this Court endorsed their myopic reading of the latter decision. But merely describing the factual context in which *Allegheny Pittsburgh* arose does not purport to confine its holding any more than *Nordlinger*'s description of *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450 (1988), means that case applies only to "bus service." *Nordlinger*, 505 U.S. at 13.

Respondents observe that *Nordlinger* holds "that 'dramatic disparities in taxation' on comparable properties are not sufficient to make out an equal protection claim." Resp. Br. 49. True enough, but what matters is whether such extreme disparities grossly depart from explicit state-law declarations that those taxpayers are all similarly situated and should be taxed equally. As explained above (*supra* pp. 8-9), the state-law backdrop here is equality among taxpayers within each project. *Nordlinger* confirms the significance of that backdrop.

Respondents claim (at 49) that *Nordlinger* "emphasizes the peculiar facts and extremely narrow holding of *Allegheny Pittsburgh*." But rather than diminish the earlier case, *Nordlinger* relies on the "obvious and critical factual difference" between the background equality norm in *Allegheny Pittsburgh*

and the fundamentally different taxation philosophy at issue in *Nordlinger*. 505 U.S. at 14-15. What respondents really mean—they admit in footnotes 5 and 6—is that the Court in *Nordlinger* should have overruled *Allegheny Pittsburgh*. But *Nordlinger* disclaimed that the decisions are in conflict. See Pet. Br. 26-28. Respondents wisely stop short of asking this Court to overrule *Allegheny Pittsburgh*. Despite their unsupported assertion that "*Allegheny Pittsburgh* was a problematic and unworkable precedent" (Resp. Br. 50 n.5), respondents cite no case evidencing any such difficulty. Recent decisions, such as *Olech* and *Engquist*, reaffirm *Allegheny Pittsburgh*'s long pedigree and current vitality.

Indeed, this case illustrates the importance of *Allegheny Pittsburgh*. That decision does not impose onerous burdens on authorities; it requires only "rough equality" among taxpayers whom state law has explicitly declared to be similarly situated. Accordingly, respondents are simply wrong to suggest that petitioners would give a constitutional remedy to a taxpayer who may "feel disadvantaged" by minor discrepancies—*e.g.*, a 10-year-plan homeowner who "paid $50 more per month" than a 30-year-plan homeowner. Resp. Br. 34. *Allegheny Pittsburgh* forbids *gross inequality*, and respondents do not dispute that the 30-to-1 disparity imposed on petitioners here is of equal magnitude to that struck down in *Allegheny Pittsburgh*. Instead, they say that because *perfection* might be difficult to achieve, they are justified in imposing massively disproportionate burdens on petitioners. But what may be a rational justification for a small disparity is not necessarily a rational justification for a gross one. *Allegheny Pittsburgh*'s sound holding stands as a bulwark

against the most extreme actions of taxing authorities.

C. Respondents' New Justifications For The City's Discriminatory Tax Scheme Are Meritless

Respondents eventually assert three primary justifications for making petitioners pay 30 times as much as their neighbors for the same sewer connection: (1) the City was acting prospectively rather than retroactively; (2) it would have been difficult to calculate and issue refunds to lump-sum taxpayers in *other* Barrett Law projects; and (3) the City had earmarked petitioners' payments for costs associated with the construction project. None is a plausible rational basis for this grossly discriminatory tax scheme.

1. Respondents' main argument is that the City's scheme "is simply an application of the basic divide between legislation that is prospective only and legislation that retroactively revisits past transactions." Resp. Br. 31. Their argument boils down to the assertion that because *some* prospective laws are rational, Resolution 101 is necessarily rational because it, too, has—as they conceive it—prospective effect.

But even assuming for the moment that Resolution 101 is fairly characterized as "prospective." prospectivity is not a rational goal in itself. True, certain government interests are rationally pursued through prospective legislation, and some are rationally pursued through retroactive legislation. A law survives rational-basis scrutiny only if it rationally furthers a legitimate government

interest—regardless of whether it can be described as prospective or retroactive. What matters is the reason underlying the line itself as judged by the context in which it is drawn.

Consider respondents' favorite example: forgiveness of penalties on overdue parking tickets. See Resp. Br. 19, 31, 39, 40, 42, 44, 47. Respondents argue that, because such amnesty programs are presumptively rational, Resolution 101 is necessarily rational because it, too, is a "prospective forgiveness" program. *Id.* at 22. They also assume the inverse is true—that, if Resolution 101 is irrational, no municipality can forgive penalties on outstanding parking tickets without running afoul of the Equal Protection Clause.

But such programs are not rational *because* they are prospective. They are rational because they arise in a fundamentally different context—withholding a small modicum of punishment for wrongdoers, typically to incentivize compliance with a law that would otherwise go unenforced with respect to certain offenders. That legitimate interest in promoting compliance is rationally served by forgiving only unpaid penalties (and thus encouraging payment of overdue tickets).

The City's decision to forgive taxpayers' Barrett Law assessments but not to issue any refunds, however, was not driven by a desire to induce compliance with the Barrett Law. Instead, the goal of Resolution 101 was to *eliminate* compliance with the Barrett Law. Indeed, respondents acknowledge that the justifications for the forgiveness programs they cite—inducing compliance and facilitating recovery of unpaid fines—do not apply in this case.

Resp. Br. 43. But the justification and context are what matters. If the justification for parking-ticket amnesty is different—and it clearly is[1]—then whether such amnesty programs have a rational basis is irrelevant.

Even the most arbitrary government classifications could be justified on the ground that they have prospective effect only. Imagine, for example, that, instead of forgiving the debts of installment payers, the City instead *increased* installment-plan payers' future bills 30-fold (without adjusting other homeowners' assessments). Under respondents' theory, that would be permissible because it operates "prospectively" and involved "open" transactions.

Respondents' reliance on "grandfather clause" cases is equally flawed. Resp. Br. 33. In *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), this Court upheld an exemption from a ban on pushcart vendors in the French Quarter for vendors who had continuously operated there for eight years. But this Court did not uphold the ordinance just because it was prospective or made a "timing" distinction. Resp. Br. 33. Rather, the Court upheld the ordinance because New Orleans "could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation"

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[1] Amnesty for penalties on overdue parking tickets, moreover, is simply a mitigation of punishment for some who have violated the law. "The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences." *Williams* v. *Illinois*, 399 U.S. 235, 243 (1970). Taxation of law-abiding taxpayers has always been governed by different standards. See Pet. Br. 28-29.

and that the exempted businesses "had themselves become part of the distinctive character and charm" of the Quarter. 427 U.S. at 305. Neither interest applies here. Indeed, the City's grossly discriminatory tax treatment undermined petitioners' "substantial reliance interests" that all homeowners would be treated equally, however they chose to pay. See Pet. Br. 33.[2]

In any event, this case does not even implicate the prospective-retroactive distinction. As explained above (*supra* pp. 8-9), the installment-plan assessments are not "open" in any meaningful sense under state law; collection is mandatory on equal footing with other taxes and guaranteed by a lien. The only truly "prospective" action here is the adoption of STEP for *future* projects—an action that petitioners do not challenge.

2. Respondents argue that it would have been "immensely difficult from an administrative standpoint for the City to have issued Barrett Law refunds to homeowners who had previously made payments." Resp. Br. 36. Respondents state that "[t]he City no longer even had records of Barrett Law assessments and payments from before the early

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[2] Cases dealing with the finality of criminal proceedings are plainly inapposite. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), was not an equal-protection case; it held that a statute requiring federal courts to reopen final judgments violated the Constitution's separation of powers. *Teague* v. *Lane*, 489 U.S. 288 (1989), likewise turned on a unique concern, namely that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Id.* at 309. Moreover, "[n]ew substantive [criminal] rules generally [do] apply retroactively." *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004).

1990s." *Ibid.* That argument is implausible on these facts.

The City had all the information it needed. When Resolution 101 was enacted, the City Controller's Office used "information systems software [to] track[] and manage[] Barrett Law debts owed to the City." Aff. of Charles White, ¶ 13, *Cox* v. *City of Indianapolis*, No. 1:09-cv-0435 (S.D. Ind. Feb. 4, 2010), ECF No. 57-3. That software calculates the precise amounts forgiven under Resolution 101 for each homeowner in each project area. Indeed, in the *Cox* litigation the City provided records showing exactly how much each lump-sum payer overpaid in *every* active Barrett Law project. City's Response to Plaintiff's Brief on Damages, Ex. A., *Cox*, No. 1:09-cv-0435 (S.D. Ind. Feb. 8, 2011), ECF No. 98-1.

Although respondents protest that "[t]he City no longer even had records of Barrett Law assessments and payments from before the early 1990s," the existence of such records is irrelevant. The 20-year and 30-year payment options were added to the Barrett Law in 2001; until then, a ten-year payment plan was the longest available. See Ind. Code § 36-9-37-8.5. Thus, when the City passed Resolution 101 in 2005, the *oldest* active Barrett Law project with outstanding balances would have been from 1995. Respondents do not claim that the City lacked records from 1995 forward—in fact, it readily submitted those very records in the *Cox* litigation. That is why the *Cox* litigation was limited to projects that were less than ten years old in 2005.[3] There is

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[3] Although respondents assert (at 36) that "[a]t the time Resolution 101 was enacted, there were over forty Barrett Law projects where homeowners had outstanding balances," the

therefore no merit to respondents' assertion that "[t]o provide refunds * * * the City would have had to review records for thousands of homeowners across hundreds of different projects."

The imagined administrative burdens would not provide a rational basis for the City's grossly discriminatory tax treatment anyway. Respondents' argument "is in essence that it is difficult to be just and easy to be arbitrary." *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, 560 (1935). This Court has rejected the argument that gross disparities of the type imposed here can be justified on administrative-convenience grounds alone. See Pet. Br. 44-45.

The cases respondents cite (at 56) do not hold otherwise. *Bowen* v. *Roy*, 476 U.S. 693 (1986), is not even an equal-protection case. It rejected a First Amendment challenge to the use of Social Security numbers to determine eligibility for welfare benefits, and stands for the proposition that "preventing fraud" by requiring a Social Security number "is an important goal." *Id.* at 709. *Mathews* v. *Lucas*, 427 U.S. 495 (1976), addressed a provision of the Social Security Act providing survivor benefits to dependent

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City's submissions in the *Cox* case demonstrate that there were at most only 24 such projects. See City's Response to Plaintiff's Brief on Damages, Ex. A, *Cox*, No. 1:09-cv-0435 (S.D. Ind. Feb. 8, 2011), ECF No. 98-1 (listing 21 projects with outstanding installment balances plus three projects in which the City forgave delinquent installments). And the City had no trouble pegging the exact dollar amount of refunds at issue; it argued (successfully) in *Cox* that the damages to all lump-sum payers in *all* other active Barrett Law projects totaled $2,783,702. *Cox* v. *City of Indianapolis*, 2011 WL 2446702, at *1 (S.D. Ind. June 15, 2011). Only $273,391 of refunds were owed to Northern Estates homeowners. Pet. Br. 11.

children. The well-fit statutory presumptions of dependency constituted "reasonable empirical judgments." *Id.* at 510. Neither case suggests that administrative convenience constitutes a rational basis for gross disparities in tax treatment.[4]

3. According to respondents, refunds are problematic "since, under the Barrett Law, homeowners' payments had been committed to special funds designed to pay the costs of the very improvements from which those homeowners had benefited." Resp. Br. 35 (citing Ind. Code. § 36-9-37-13). But "dollars are fungible." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 49 n.7 (1989). Indeed, respondents admit that the City could have provided refunds to petitioners by "arrang[ing] for payments from non-Barrett Law sources." Resp. Br. 36.

The City also could have forgiven assessments in a way that would have avoided causing gross disparities in tax treatment without imposing on other funds. For example, contrary to the City's

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[4] *Carmichael* v. *S. Coal & Coke Co.*, 301 U.S. 495 (1937), on which *amici* the International Municipal Lawyers Association rely (at 5), is also inapposite. That case upheld an exclusion from a state unemployment-compensation act for employers of fewer than eight persons. The Court explained, "[w]e cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained." 301 U.S. at 511. But in this case the City made no distinction between taxpayers based on the "amount of the tax" owed by each homeowner. *Ibid.* In any event, the Barrett Law itself draws a line at which the burden of collection outweighs the benefit, prohibiting election of installment plans for assessments of less than $100. Ind. Code § 36-9-37-8.5(f). The statute thus refutes the idea that the City forgave millions in installment payments to avoid the burdens of collection.

assertion (at 18) that it "had three basic options," (collect for 30 years, refund all payments, or forgiveness without refunds) collecting Brisbane/Manning assessments for just two-and-a-half more years would have allowed the City to spread the same dollar amount of forgiveness equally among all Northern Estates homeowners, forgiving $6,900 for each. See Pet. Br. 52-53. Because the other Barrett Law projects affected by Resolution 101 were older (and thus the asymmetry between lump-sum and installment-plan taxpayers less severe) even shorter periods would have fully funded the "rough equality" that the Constitution requires. The fact that "a more precise and direct classification is easily drawn"—and need not have cost the City a nickel out of pocket—is telling evidence of irrationality. *Williams*, 472 U.S. at 23 n.8.

4. Respondents appear to abandon both of the principal justifications advanced by the lower court.

First, the lower court held that the City could reasonably have concluded that homeowners who chose to pay their assessments in installments were more likely to be lower- or middle-income taxpayers than those who chose to pay their assessments in full. Pet. App. 15a-16a. Respondents do not attempt to defend that logic. Instead, they briefly suggest an even more convoluted way for the City to have viewed payment method as a proxy for "financial position." "Obviously," respondents declare, "those with no outstanding Barrett Law balances were in a better 'financial position' in terms of liquidity to pay the higher monthly fees [imposed under STEP] than those facing the new fees and the prospect of paying off outstanding balances." Resp. Br. 57. But the

notion that petitioners were somehow more "liquid[]" than homeowners who opted for the installment plan strains credulity—or at least mistakes what "liquidity" means. Petitioners had just paid $9,278 out of pocket, whereas homeowners paying in installments had paid one-tenth to one-thirtieth of that amount. If anything, petitioners were *less* "liquid" than other homeowners, and therefore in a worse "financial position" to pay increased STEP fees.

Second, the lower court held that the City had a legitimate interest in "preservation of limited resources." Pet. App. 18a-19a. Respondents focused exclusively on that argument in their Brief in Opposition, conceding—twice—that all of the City's other reasons for forgiveness without refunds would have been accomplished if refunds were also extended. Br. in Opp. 6, 11. Respondents now characterize those concessions as "isolated remarks," Resp. Br. 54, and decline to address any of this Court's cases rejecting the proposition that "preservation of limited resources" is a sufficient rationale for discriminatory tax treatment. See Pet. Br. 41-43 (citing cases).

D. Respondents' Ever-Shifting Justifications Cannot Plausibly Have Been The Reasons For The City's Grossly Discriminatory Tax Scheme

Respondents repeatedly rely on this Court's statement that rational-basis review does not demand "that a legislature or governing decision-maker actually articulate * * * the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. But respondents can take no solace in that proposition. To survive rational-basis scrutiny, a

government cannot simply put forth any *post hoc* justification that could, in theory, constitute a legitimate government objective for *some* amount of disparity. Rather, the Equal Protection Clause requires that the policy reason asserted be "a *plausible* policy reason for the classification." *Id.* at 11 (emphasis added).

Respondents contend that "a 'plausible basis' is simply a rational one." Resp. Br. 51. As this Court made clear in *Nordlinger*, however, rational-basis scrutiny "require[s] that a purpose may *conceivably* or 'may *reasonably have been* the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (emphasis added) (quoting *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528-529 (1959)). Applying that principle, the Court in *Nordlinger* distinguished *Allegheny Pittsburgh* because in that case "the facts precluded any *plausible inference* that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Ibid.* (emphasis added). A "plausible policy reason" is thus one that "could *conceivably* have been the purpose" of the government decisionmaker in light of the facts or statutory scheme. *Ibid.* (emphasis added); see *Fitzgerald* v. *Racing Ass'n*, 539 U.S. 103, 110 (2003) ("the facts" did not "preclud[e] an inference that the reason for the different tax rates was to help the riverboat industry") (internal quotation marks omitted).

None of the rationales offered by respondents could "conceivably have been the purpose" of making petitioners pay 30 times as much as their similarly situated neighbors. *Nordlinger*, 505 U.S. at 15. It is implausible that the City distinguished between

Northern Estates homeowners based on their "financial condition"; the Barrett Law demanded equality in assessments and the City confirmed that its "intent [was] to treat property owners within each project area equitably, based upon the scope and value of each specific project." JA51; see Pet. Br. 48. It is implausible that the City withheld relief because it lacked the necessary records; respondents acknowledge that the City possessed all the records pertaining to this Barrett Law project (and all other active projects) when Resolution 101 was enacted. And it is implausible that the City declined to provide refunds because petitioners' payments were already "committed"; respondents cannot deny that the City could have used other funding sources or briefly continued collections to provide refunds. In respondents' view, even indisputably counterfactual justifications are "plausible" bases for gross disparities; this Court has rightly rejected that limitless assertion.[5]

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[5] This Court has made clear that, when statutes "specifically declare[] their purpose," they leave "no room to conceive of any other purpose for their existence." *Allied Stores*, 358 U.S. at 530. Respondents suggest that case "merely" stands for the proposition that "when legislation expressly declares a *suspect purpose*, a government cannot later attempt to disclaim that rationale by advancing a different one." Resp. Br. 52. But this Court has not limited *Allied Stores* in that way. To the contrary, in *Nordlinger* this Court cited *Allied Stores* in support of its conclusion that "*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme." *Nordlinger*, 505 U.S. at 15 & n.7. Once a government has declared its purpose, it cannot back away from that purpose by offering new rationales that are inherently implausible in light of the statutory scheme.

III. THE PROPER REMEDY FOR THE CITY'S DISCRIMINATORY TAX TREATMENT IS TO PROVIDE REFUNDS TO PETITIONERS

In a last-ditch effort, respondents suggest that, even if this Court holds that the City's discriminatory tax scheme violated the Equal Protection Clause, the City can remedy that violation by rescinding forgiveness without providing refunds to petitioners. Resp. Br. 57-59. As this Court explained in *Allegheny Pittsburgh*, however, "'[t]he Equal Protection Clause is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.'" 488 U.S. at 346 (quoting *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946)). Relying on that language, the state intermediate court held here that "the proper remedy is not to penalize everyone equally but to grant the benefit given to others to the complaining taxpayer." Pet. App. 76a.

Respondents' selective quotation of *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984), is not to the contrary. The Court there *reaffirmed* that "ordinarily extension [of the unconstitutionally withheld benefit], rather than nullification, is the proper course." *Ibid.* (internal quotation marks omitted). There is no reason to depart from that "ordinar[y]" practice here.

Indeed, although respondents argue (at 59) that "a remedial outcome consonant with the [government's] overall purpose is preferable," that very principle militates *against* allowing the City to rescind its forgiveness decision in this case. Citing affidavits submitted in the *Cox* litigation, respondents claim that

lawmakers "would have preferred" not to enact Resolution 101 if they had known that doing so would require refunds. Resp. Br. 59. As the district court in *Cox* held when respondents advanced the same argument, however, "[t]he legislative enactment itself is the best indication of legislative intent"—and certainly a better indication than *post hoc* statements of regret. *Cox* v. *City of Indianapolis*, 2011 WL 96669, at *4 (S.D. Ind. Jan. 11, 2011). Resolution 101's legislative purpose is clear: It was enacted to *eliminate* "financial hardships [presented by the Barrett Law] on many middle to lower income participants." Pet. App. 89a. Reinstating all the forgiven assessments would thwart that objective.

CONCLUSION

The judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-161

In The
Supreme Court of the United States

CHRISTINE ARMOUR, et al.,

Petitioners,

v.

CITY OF INDIANAPOLIS, INDIANA, et al.,

Respondents.

On Writ Of Certiorari To The Indiana Supreme Court

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice (IJ) is a nonprofit public-interest law firm that litigates in support of greater judicial protection for individual rights, including rights that are not presently deemed fundamental – such as private property ownership and occupational freedom – and are therefore subject to rational-basis review. As part of this advocacy, IJ has an interest in ensuring that lower courts properly apply this Court's rational-basis jurisprudence.

All parties in this case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF ARGUMENT

This is a case about the rational-basis test. Specifically, it is about *which* rational-basis test the Court chooses to apply. One rational-basis test is so deferential as to be no test at all – a mere rubber stamp of government action. But there is another rational-basis test: the test this Court actually applies when adjudicating rational-basis cases. Plaintiffs have prevailed in fully 15% of modern rational-basis cases decided by this Court – and that is because, as

[1] Counsel for the parties in this matter did not author this brief in whole or in part. No person or entity other than the Institute for Justice, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

amicus will explain below, the rational-basis test is not the supine caricature of judicial review sometimes described by academics. It is a real (though deferential) standard, requiring real scrutiny.

In rejecting Petitioners' claims below, the Indiana Supreme Court embraced a common misconception of this Court's rational-basis jurisprudence. In short, it decided that "rational basis" review effectively means that "the government always wins," and that any decisions of this Court in which the government did *not* win must be one-off cases that are limited to their facts. *See* Pet. App. 27a-28a (holding that *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment was [legitimate]" and had "been narrowed to its facts"); *id.* at 16a (holding that the court was bound to disregard "what the actual facts would show").

But this understanding of the rational-basis test as a mere judicial rubber-stamp cannot be squared with this Court's rational-basis precedents, in which plaintiffs have prevailed in 18 out of 117 cases since 1970. To be sure, this reflects a test that is deferential to the government, but it cannot be reconciled with the complete absence of scrutiny afforded by the lower court in this case. Simply put, the rule of law cannot tolerate a system under which this Court's rational-basis decisions in favor of government count as precedents, while any decisions in which plaintiffs win are automatically "narrowed to [their] facts." It is

incumbent upon lower courts to look beyond *dicta* about how deferential the rational-basis test is to discern the principles that are at work when this Court has determined a government action fails that test.

Looking beneath the rhetoric, there are three specific principles by which this Court invalidates statutory classifications under the equal-protection guarantee in the rational-basis context: (1) the absence of any logical connection between even a hypothetical rational basis and the statutory classification; (2) the public harm imposed by a statutory classification is so vastly larger than any plausible public benefit as to render the classification irrational; or (3) the statutory classification seeks to achieve a goal that is not a legitimate objective of government. It is also clear that the Court applies these principles in light of record evidence and is not bound to accept *post hoc* rationalizations for government classifications when those rationalizations can find no footing in the facts of the case.

As applied to this specific case, these principles demand reversal. The simple fact that the City of Indianapolis could save money by refusing to refund Petitioners' excess tax payments cannot justify the disparate treatment of property owners. The county government in *Allegheny Pittsburgh*, after all, would have had more money if it had been allowed to continue charging wildly disproportionate tax rates to some property owners – as, indeed, would any government entity if it were allowed to arbitrarily single out a particular citizen and demand that he empty

his pockets. And the rationale actually accepted by the Indiana Supreme Court below – that the City could have charged these disparate rates out of a belief that the property owners who had not already paid their taxes in full were poorer than the property owners who had pre-paid their assessment – is exactly the sort of counterfactual *post hoc* speculation that this Court rightly rejects in the rational-basis context.

The rational-basis test, as applied by this Court, is a deferential but real form of judicial review, under which government classifications are required to bear an actual, factually plausible relationship to a legitimate government end. And, applying the rational-basis test as it actually exists in this Court's precedents, the Indiana Supreme Court's decision must be overturned.

ARGUMENT

This brief proceeds in two sections. First, *amicus* demonstrates that the rational-basis test, as applied by this Court, is a meaningful standard of review conducted in light of actual evidence. Second, *amicus* demonstrates that applying the real rational-basis test – as distinct from the caricature of that test applied below – confirms that there is no rational basis for the City of Indianapolis's wildly disproportionate property-tax rates.

I. THE RATIONAL-BASIS TEST IS A REAL STANDARD OF REVIEW.

There are two rational-basis tests in American jurisprudence. Each of them takes the standard form – that government action will be upheld "so long as it bears a rational relationship to a legitimate government interest." *District of Columbia v. Heller*, 554 U.S. 570, 687-88 (2008) (internal quotation marks and citation omitted). But there are two sharply different readings of what that test means. The first, which has been described in *dicta* by this Court and is frequently invoked by commentators,[2] is not even a standard of review but simply an injunction that, in a dispute between the government and a citizen, the government must always win. The second, which is the test actually applied by this Court in its decisions, imposes meaningful limits on how governments may treat their citizens.

There is, to be sure, no shortage of *dicta* in this Court's decisions that appear to describe a test under which the government will always win.[3] Consider, for

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[2] *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term-Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (calling rational-basis review a "virtual rubber stamp").

[3] *Amicus* does not dispute the existence of *dicta* describing, in sweeping terms, the deference required by the rational-basis test. *See, e.g.*, *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993) ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) ("[T]he Equal Protection Clause does not

(Continued on following page)

example, the plaintiff's burden "to negative every conceivable basis" for a challenged law "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citations and internal quotation marks omitted). Taken at face value, this describes a standard that is metaphysically impossible to meet: The human imagination will always be able at least to *conceive* of a hypothetical basis for a statutory classification that even the most conscientious plaintiff, under even an ideal set of facts, has failed to "negative" in her summary-judgment papers. Thus, if boilerplate like "negative every conceivable set of facts" is taken at face value, then there can be no meaningful judicial review of most government classifications because "rational-basis review" could not possibly mean anything other than "the government always wins."

But the government does *not* always win, which is why there must be more to rational-basis review than

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demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ."); *Dandridge v. Williams*, 397 U.S. 471, 485 (1972) ("If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."). Rather, *amicus* contends that this *dicta*, taken at face value, cannot be squared with the actual holdings of this Court in rational-basis cases.

the caricature sometimes described in law-review articles. Indeed, since 1970, this Court has heard 117 different equal-protection cases in which it applied rational-basis review, and it has found in favor of the plaintiffs in 18 of those cases. In no case has this Court ruled in favor of plaintiffs only after determining that it was literally impossible to conceive of even a hypothetical rationale for the challenged classification that the plaintiffs had failed to "negative." This proves that the actual reasoning employed and outcomes reached by this Court in its equal-protection rational-basis cases are wildly different from what one would predict based simply on the oft-cited *dicta* quoted above.

If the most sweeping *dicta* about the rational-basis test is inaccurate, however, it becomes necessary to look for unifying principles underlying this Court's rational-basis jurisprudence. That is, it becomes necessary to treat the Court's rational-basis cases as *precedents* and, as with any precedents, look for underlying principles that can be consistently applied. A careful examination of the cases where this Court has applied the rational-basis standard makes these basic principles apparent.

When this Court invalidates a government classification under rational-basis review, it does so in three separate circumstances:

> (1) where there is no logical connection between a proffered legitimate interest and the statutory classification;

> (2) where the public harm imposed by a statutory classification is so vastly larger than any plausible public benefit as to render the classification irrational; or
>
> (3) where the statutory classification seeks to achieve a goal that is not a legitimate objective of government.

Moreover, this Court conducts rational-basis analysis in *reality*, not in a fantasy realm of "any conceivable set of facts." In applying the principles above, the Court demands that a proffered rationale be *plausible* – that is, it requires an explanation for the government's action that can actually be squared with the record and with common sense. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

Below, *amicus* discusses each of the principles used by this Court to decide in favor of rational-basis plaintiffs – lack of logical connection, disproportionate harm, and illegitimate ends – and then explains that the rational-basis test (like any judicial

determination) is conducted in light of record evidence rather than simply in light of any made-up facts or justifications the human imagination can conjure. Finally, *amicus* demonstrates that the principles animating this Court's decisions in rational-basis cases where plaintiffs win are perfectly consonant with the holdings of this Court's rational-basis cases where plaintiffs lose.

A. This Court Rejects Legislative Classifications When There Is No Logical Connection Between the Classification and a Government Interest Offered in Support of It.

A statutory classification will fail rational-basis review when there is no logical connection between the classification and the government interest (or interests) proffered in support of it. In such circumstances, invalidation of the classification is appropriate – deference to legislatures notwithstanding – because an utter absence of logic renders a statutory scheme arbitrary. The authority to legislate, whether exercised by Congress or a village council, has never been understood to include the power to legislate arbitrarily.

A clear illustration of this principle is found in *Zobel v. Williams*, 457 U.S. 55, 61-62 (1982). *Zobel* involved an equal-protection challenge to an Alaskan program that distributed oil revenue each year to citizens based on the length of their state residency.

For every year of Alaska residency since 1959, residents were entitled to one share of the dividends of the state's oil fund. *Id.* at 56-57. In other words, people who had moved to Alaska earlier would receive a special windfall payment – forever. A group of latter-day Alaskans brought suit, alleging that this permanent classification between bona fide residents violated the Equal Protection Clause. *Id.* at 57-58.

Alaska proffered two possible rationales in defense of its unequal treatment of earlier and later residents that the Court rejected on logical grounds. The State argued that the windfall of oil money to earlier residents: (1) encouraged others to move to sparsely populated Alaska; and (2) gave residents a stake in the prudent management of oil reserves. *Id.* at 61.

Alaska's asserted interests – growing its population and managing its natural resources – were clearly legitimate, but this Court nonetheless invalidated the distinction because there was no logical connection between those interests and the challenged statutory classification. *Id.* at 61-63. Giving more oil money to people who already lived in Alaska obviously would not incentivize *new* people to move to Alaska, since new residents were categorically excluded from receiving that oil money. And preserving natural resources by giving Alaskans a financial stake in their use is surely a legitimate interest – but not one that justifies giving that financial stake to *some* Alaskans while arbitrarily excluding others.

The no-logical-connection principle is also evidently at work in other rational-basis decisions of this Court. In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), for example, this Court acknowledged that a home's being too big could be a valid reason for denying a permit, but found no logical connection between that principle and the City's actions in light of the fact that homes of identical size were routinely granted permits. *Id.* at 449. Similarly, in *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985), the State of Vermont asserted its legitimate interest in encouraging Vermont residents to purchase cars within the state, but this Court found no logical connection between that interest and the State's attempt to levy a tax on a car purchased out of state before its owner had even moved to Vermont. *Id.* at 24-25.[4]

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[4] *See also Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (finding no logical connection between an individual's ability to understand politics and an individual's ownership or non-ownership of land); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (same); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing people who are related to one another); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (finding no logical connection between fitness for political office and property ownership).

B. This Court Invalidates Statutory Classifications Where the Harm Caused by the Classification Vastly Outweighs Any Plausible Public Benefit.

This Court also rejects statutory classifications where the government's proffered justifications – such as saving money – are so wildly out of proportion with the harm caused by the classification that no rational legislator would accept them. In *Plyler v. Doe*, for example, the government asserted that denying public education to the children of illegal immigrants could help save government funds, which the Court rejected as a "wholly insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates. 457 U.S. 202, 230 (1982).

Even more analogous to the instant case is *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). In *Allegheny*, the state of West Virginia used the most recent purchase price of land to assess property taxes, but because some property had not changed hands for decades this resulted in recent purchasers paying taxes as much as 35 times more than neighbors who had purchased long ago. *Id.* at 340-41. The county argued that, as a general proposition, purchase price was the most precise measure of property value, and that the wild disparities that resulted in some circumstances should be accepted as a necessary evil. *Id.* at 343. This Court, however, rightly refused to allow the county to impose gross disparities simply because doing so was in some

vague sense easier for county officials. *Id.* at 345-46. Thus, the mere fact that some small benefits (like cost savings) could plausibly be attributed to an unequal classification will not save it from invalidation if it achieves those small benefits at the price of imposing grossly disproportionate burdens.[5]

C. This Court Invalidates Statutory Classifications When They Seek to Advance an Illegitimate Government Interest.

Finally, this Court rejects statutory classifications that seek to advance illegitimate ends like animus or sheer favoritism (or disfavoritism) for its own sake. The constitutional impermissibility of this kind of naked, unjustified preference is well illustrated in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). In that case, this Court held that the government could not justify withholding benefits from households made up of unrelated people on the

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[5] *See also James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicts on debtors); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

basis of a general animus towards "hippies." *Id.* at 534. In other words, government must justify its classifications by pointing to something beyond a simple desire to make that classification – it may not simply treat people worse for the sheer sake of treating those people badly.[6] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (coining the term "naked preference" to describe "the distribution of resources and opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.").

D. A Rational Basis Is One That Is Plausible in Light of Record Evidence.

In applying the principles laid out above, this Court routinely looks at and weighs record evidence. This means, for example, that it accepts proffered rational bases *only* if it is factually plausible that the

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[6] *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding no legitimate interest in criminalizing consensual adult homosexual acts); *Cleburne*, 473 U.S. at 448 (rejecting sheer dislike of people with mental retardation as legitimate government interests); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (finding no legitimate interest in anti-gay animus); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (finding no legitimate interest in creating different classes of bona fide residents); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (finding no legitimate interest in discriminating against out-of-state companies); *Zobel*, 457 U.S. at 65 (finding no legitimate interest in creating permanent classes of bona fide residents).

suggested rationale could actually have motivated the action in question. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served."); *Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7; *Weinberger*, 420 U.S. at 648 n.16. Similarly, the Court will rely on evidence to determine whether there is a logical connection between the government's action and an asserted rational basis. *See, e.g., Cleburne*, 473 U.S. at 449 (citing district court's post-trial findings of fact, as well as appellate court's reliance on those findings of fact).

The willingness to examine evidence in the above cases is in no way anomalous. Indeed, even in its earliest articulations of the test, this Court has always assumed that plaintiffs have the right to tender evidence to disprove the purported rationale underlying the government's action. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (internal citations omitted)).

An important corollary to this principle is that the Court does not actually fabricate rational bases out of whole cloth on appeal. Notwithstanding *dicta* about upholding classifications based on "any conceivable basis," in none of the Court's rational-basis decisions has its decision hinged on a rationale devised out of whole cloth by an appellate judge.[7] Instead, the Court (when deciding in favor of a government defendant) has always been able to point to a rational basis of which the parties were aware – or, at minimum, clearly should have been aware. *Cf. Beach Commc'ns*, 508 U.S. at 317 (suggesting that Congress could have rationally adopted the explanation articulated by the FCC for its prior administrative scheme in passing a law that tracked these earlier regulations).

And there is good reason that this Court does not actually uphold laws based on the *post hoc* speculation of appellate judges: doing so would present serious due-process concerns. The central meaning of due process, as this Court has stressed for over a century, is that parties are entitled to notice and a

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[7] While this Court has used similarly sweeping language in other contexts, such as the rule that a complaint will not be dismissed unless "no set of facts" could be proved that would entitle the plaintiff to relief, it regularly stresses that sweeping language like this has to be read reasonably, not literally. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560-63 (2007) (explaining that the "no set of facts" rule must be read reasonably and cannot be interpreted as dispensing with the need for a *plausible* set of facts).

meaningful opportunity to be heard. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). And, as lower courts have had repeated occasion to point out, litigation by surprise is not a *meaningful* opportunity to be heard. *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1401 (6th Cir. 1991) (noting that a defendant must have notice of the nature of proceeding to which he is subject); *Care and Protection of Orazio*, 861 N.E.2d 476, 482-83 (Mass. App. Ct. 2007) (finding trial judge's conversion of a custody hearing into a trial on the merits deprived mother of due process).[5]

Allowing classifications to be upheld based on explanations first invented at the appellate level would fly in the face of these bedrock principles. To be sure, the government is entitled to rely on a rational basis that is not directly supported by record evidence (provided that basis is not undermined or shown to be implausible by record evidence), and the government is similarly entitled to rely on a rational basis that may not have actually been the subjective motivation of particular legislators. But plaintiffs are entitled to introduce evidence demonstrating a lack of rational

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[5] *Cf. United States v. Phillips*, 540 F.2d 319, 326 (8th Cir. 1976) (rejecting the argument that, in order to introduce evidence from a wiretap, the government first had to prove the "interception was made for *no* criminal, tortious, or other injurious purpose" because this test "would create an impossible burden of proving three negatives").

connection between a challenged classification and the government interest it supposedly advances, and allowing new rational bases to be formulated *ex nihilo* on appeal makes it impossible for even the most conscientious of plaintiffs to build a complete record on summary judgment – to discharge, in other words, their burden of "negativing" potential justifications for the challenged law."

In short, facts matter in rational-basis cases, and rational-basis plaintiffs are allowed to introduce evidence to show courts what those facts are. Because of this, this Court has always evaluated the classifications before it in light of the possible rational bases actually articulated by (or reasonably attributable to) the government, rather than in light of any conceivable justification that could be imagined by an appellate judge.

" Taking the current case as an example, it is perhaps conceivable that the City of Indianapolis wanted certain property owners to pay lower taxes because those property owners were more likely to be military veterans, or because they were more likely to have small children, or because their particular homes were more likely to require asbestos removal. But there is no reason to believe any of those things is true, and it would be absurd to penalize plaintiffs for failing to "negative" those possible justifications (along with countless others) when neither the government nor any evidence actually points to them.

E. The Principles Evident in This Court's Rational-Basis Decisions in Favor of Plaintiffs Also Explain This Court's Rational-Basis Decisions in Favor of Government.

In rational-basis cases where the government wins, this Court does not depart from the principles outlined above. Rather, the basic truths of the rational-basis test are consistently applied in all this Court's rational-basis cases.

Even in *FCC v. Beach Communications*, 508 U.S. 307 (1993) – arguably the most-cited case for the proposition that rational-basis analysis is extremely deferential – the Court did not base its decision on wholesale conjecture. Instead, it relied on policy goals articulated by the government and examined the underlying logic of the government's actions.

The plaintiffs in *Beach Communications* had challenged the exemption from cable-television regulations of facilities that provided service to one or more buildings under common ownership without using a public right-of-way. *Id.* at 309. The Court identified two rational bases for this distinction. Most importantly, it identified the policy statement articulated by the FCC, which first promulgated the exemption in regulations before it was adopted by Congress, which justified the exemption by contending that commonly owned facilities of this sort would tend to be smaller and therefore less in need of regulation. *Id.* at 317.

Importantly, the plaintiff-respondents in that case did not refute the underlying factual premises of this distinction – and, indeed, expressly acknowledged that commonly owned facilities (where a single owner would have the incentive to advocate on behalf of his tenants to an outside cable provider) might need less regulation. *Id.* at 318-19. The fact that these premises were plausible – or, in the Court's phrasing, "arguable" – was enough to support a logical connection between the government's classification and the interests it had identified. *Id.* at 320.[10]

To be sure, this Court's opinion in *Beach Communications* is the source of some of the most sweeping *dicta* about the rational-basis test, most notably for its statement that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. But, read in context, this statement merely stands for the uncontroversial proposition that courts will not engage in factual investigation of what "actually motivated" a legislature or require the

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[10] As an alternative possible rational basis, the Court added in a single paragraph that cable distribution across buildings without a common owner could also have been justified by a concern about monopoly power, since the first owner to purchase a satellite dish would be able to connect nearby buildings for only the cost of connecting wire, and nearby owners would be unable to compete without making the hefty investment in a dish of their own. *Id.* at 319-20. This alternative, however, was *dicta* and not essential to the Court's core holding.

government to meet an affirmative evidentiary burden "explaining the distinction on the record." *Id.* (internal citations and quotation marks omitted). It does not purport to invalidate the line of cases reaffirming that courts can and should examine facts and evidence in rational-basis cases, even if the burden of providing that evidence is entirely on the plaintiffs. Indeed, the Court cited *Minnesota v. Clover Leaf Creamery Co.* without finding it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" 449 U.S. at 463 n.7; *cf. Beach Commc'ns*, 508 U.S. at 315 (citing *Clover Leaf Creamery*, 449 U.S. at 464). And, indeed, in the wake of *Beach Communications*, this Court has continued to examine facts in the rational-basis context. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (explaining that the government prevails in rational-basis cases where government classifications are "narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it served.").

The disagreement between the Court and Justice Souter's dissenting opinion in *Heller v. Doe*, 509 U.S. 312 (1993) is also instructive. In that case, the Court upheld Kentucky's rules under which a person with mental retardation could be involuntarily committed based on "clear and convincing evidence" while a mentally ill person could only be committed based on

a showing "beyond a reasonable doubt." *Id.* at 315. The Court upheld this distinction, accepting Kentucky's argument that mental retardation (unlike mental illness) is a developmental disability that becomes evident in childhood, and that it imposed the lower burden of proof because there was less risk of erroneously committing someone for mental retardation than for mental illness. *Id.* at 322. Justice Souter dissented, arguing that the Court was misunderstanding the "principal object in setting burdens of proof," which was not just to avoid error but to balance all the relevant interests at stake in a hearing. *Id.* at 339-40 (Souter, J., dissenting).

This dispute further clarifies what the rational-basis test is – and is not. The dissenting opinion in *Heller* erred because it disputed the legislature's *ends*, and, unless the ends the legislature is pursuing are illegitimate, this Court does not substitute its own policy judgment for a legislature's. Since Kentucky's policy was to use burdens of proof to equalize the risks of erroneous confinement (rather than to use them as part of a broader balancing test) and since its "basic premise that mental retardation is easier to diagnose than is mental illness ha[d] a sufficient basis in fact," the state's classification survived rational-basis scrutiny. *Id.* at 322; *see also id.* at 323 n.1.

The opinions in *Heller v. Doe*, therefore, illustrate the Court's principled approach to the rational-basis test. Because the test is deferential, the Court did not second-guess Kentucky's policy judgments – it accepted the State's end goal of equalizing the risk of

erroneous confinement. In doing so, however, the Court examined the facts to see whether the premises underlying the State's actions were plausible, *and* the Court evaluated whether the State's actions were logical in light of its asserted ends. Sometimes applying these principles yields a victory for the government; sometimes it does not. But the Court consistently applies the same meaningful test in every case.

II. THE CITY'S DISPARATE TAX RATES CANNOT SURVIVE THIS COURT'S RATIONAL-BASIS ANALYSIS.

Armed with the principles outlined above, the analysis of this case is relatively straightforward. The City of Indianapolis created two classes of property owners. The first class, those who elected to pay their tax assessments in full in 2004, paid taxes at a rate of $9,278 per parcel. The second class, those who elected to pay the assessment in installments in exchange for a 3.5% annual interest rate, were forgiven the balance of their debt one year later and paid taxes at a rate between three and 10 percent of the first class's tax rate.

In order to uphold that classification, this Court must be able to identify a factually plausible rational basis for it that does not violate any of the three principles identified in Part I. No such rational basis is evident, and the lower court's judgment should therefore be reversed.

The rational bases accepted by the Indiana Supreme Court fall into two basic categories. First, the court accepted different permutations of the idea that the City's classification could be justified by the City's desire to save money (either directly, by not refunding the Petitioners' overpayments, or indirectly, by avoiding the administrative costs associated with refunding the Petitioners' overpayments). Second, the court endorsed a rational basis of its own invention – the idea that the City's imposition of different tax rates could be justified by the desire to help poorer property owners.

The first category of proffered rational bases has been amply addressed by Petitioners. As demonstrated in Petitioners' opening brief, the fact that a municipality will save money cannot, standing alone, be a rational basis for a particular classification because it lacks any limiting principle. Pet. Br. 41-46. It will always be the case that a government entity will be able to raise more money by arbitrarily selecting citizens and ordering them to empty their pockets than it would by imposing an equitable, non-arbitrary scheme of taxation – but this Court's precedents nonetheless prohibit governments from raising revenue through arbitrary means. *See Allegheny Pittsburgh*, 488 U.S. at 345-46 (citing cases); *see also Williams v. Vermont*, 472 U.S. at 25 (rejecting discriminatory tax on automobiles purchased by non-residents); *cf. Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (rejecting the State's desire to incentivize purchase of

government securities as a justification for discriminatory tax on out-of-state insurance companies). Moreover, as Petitioners demonstrate, there is no reason to believe that the administrative burden of refunding Petitioners' overpayment would be anything other than *de minimis*. Pet. Br. 44. As explained above, this Court has regularly rejected the idea that simple cost-savings constitute a rational basis for severely disparate treatment of similarly situated people. *See supra* at 12-13.

Because the first category of rationale accepted below is untenable, it becomes necessary to examine the second justification embraced by the lower court. And this purported rationale – the notion that taxing people who prepaid their taxes at a higher rate would reduce the tax burden on the poor – must also be rejected because it runs afoul of this Court's rational-basis precedents in two independent ways. First, it is not plausible in light of the evidence that the City of Indianapolis was trying to aid low-income property owners by imposing a sewage assessment and then rescinding it while forgiving the outstanding balances of those who were paying on an installment plan. Second, there is no logical connection between the City's actions here and the government's interest in helping the poor.

1. The asserted rational basis is not plausible in light of the evidence. First, it cannot be plausibly asserted that the City's disparate treatment of the two classes of property owners (pre-payers and

installment-plan payers) was motivated by a desire to help the poor. The City has been crystal clear in describing its motivations for its actions, both prior to and during litigation, and those motivations cannot be squared with a desire to help poorer landowners by forgiving their debt. Pet. Br. 37-40. Indeed, the explicit policy of the law under which Petitioners were initially assessed, as well as the explicit policy of the City in refusing to refund their overpayments, was to treat all property owners *equally*. Pet. Br. 3, 8.

To be sure, the rational-basis test allows courts in some circumstances to accept hypothetical rational bases for a law, even if those bases are not evident from legislative history. *See, e.g., FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993). But this Court has never held that a hypothetical rational basis can be accepted if it actually conflicts with the legislature's own stated policy. *See supra* at 14-18.

There is good reason for this rule: Allowing courts to hypothesize rational bases that are at odds with the legislature's own explicit policy is the opposite of judicial deference. It is, quite simply, substituting a judge's vision of what good policy might be for the legislature's actual vision of good policy. Here, where both the Indiana legislature and the City of Indianapolis have articulated a specific policy of treating all property owners as equals, the Court should not reject that stated policy and assume that instead the City actually had a contrary, secret purpose of treating property owners differently based on their imagined incomes. To do so would not be judicial

deference to legislative prerogatives; it would be judicial defiance of them.

Legislative actions are entitled to deference, but *deference* is different from *fantasy*. This Court should therefore reject the lower court's invitation to fabricate a government policy at odds with the policy actually articulated by the City of Indianapolis.

2. There is no logical connection between the City's actions and helping poorer landowners. Even if the Court assumes that the City had a secret purpose of helping the poor when it changed its sewer-assessment system and refused to refund Petitioners' overpayments, there is no logical connection between that purpose and what the City actually did. The lower court suggested that the disparate treatment could be justified by a belief that those who had prepaid their tax assessment "were in better financial positions than those who chose installment plans." Pet. App. 16a. But the court's decision is bereft of any explanation of what, exactly, would make this belief reasonable – or, indeed, any more reasonable than believing that exactly the opposite was true.

Simply put, there is no logical reason to assume that people who paid their tax assessment in full were better off than people who chose to pay in installments. The installment plan offered to the affected property owners was, in effect, a loan (over a 10-year, 20-year, or 30-year term) with a statutory interest rate of 3.5% per year. Pet. App. 4a. Accepting a loan at a 3.5% interest rate is not evidence of relative

poverty – it is simply evidence that the property owner could get a better return on her money by placing it elsewhere instead of paying the tax assessment right away.

A property owner could, for example, have decided to accept a loan at such an attractive rate in order to pay off other household debt like a mortgage or to invest money elsewhere. This means that the installment plan could be an attractive option for a property owner *regardless* of her wealth – indeed, historical data shows that the 3.5% rate offered by the City was lower than the contract interest rate on a 30-year mortgage during any month in 2004.[11] The interest rate offered by the City was also lower than the typical municipal-bond interest rate (as reflected in the Bond Buyer 20-Bond GO Index) for any month in 2004.[12] A person's decision to take a cheap loan from

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[11] *See* Board of Governors of the Federal Reserve System, CONTRACT RATE ON 30-YEAR, FIXED-RATE CONVENTIONAL HOME MORTGAGE COMMITMENTS, *available at* http://www.federalreserve.gov/datadownload/Output.aspx?rel=H15&series=4c9742f6cd2efded850db98de3f2c75d&lastObs=&from=&to=&filetype=csv&label=include&layout=seriescolumn (last visited Jan. 5, 2012). A compilation of the Federal Reserve data cited herein (as well as other interest-rate data) may be retrieved from the Federal Reserve's website. *See* Board of Governors of the Federal Reserve System, *Selected Interest Rates (Daily) – H.15*, *available at* http://www.federalreserve.gov/releases/h15/data.htm (last visited Jan. 5, 2012).

[12] *See* Board of Governors of the Federal Reserve System, BOND BUYER GO 20-BOND MUNICIPAL BOND INDEX, *available at* http://www.federalreserve.gov/datadownload/Output.aspx?rel=H15&series=19162969f035eea850a9362c9956903a&last

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the government would not be evidence of her relative financial position at all. For many – if not all – people, it would simply be evidence of sound financial planning.

It is worth noting that, just as there is no *logical* reason to believe that taxpayers who prepaid their tax assessments were in a better financial position than those who did not, there is no *factual* reason to believe that either. Indeed, the evidence in the parallel federal-court action over the City's sewer-funding tax showed that, frequently, just the *opposite* was the case. The original sewer-assessment program already had a financial-assistance program for "families who made less than 80% of the City of Indianapolis's median household income . . . ." Mem. in Supp. of Pls.' Mot. for Summ. J. at 12, *Cox v. City of Indianapolis*, No. 09-435 (S.D. Ind. January 4, 2010) (internal quotation marks omitted). So the property owners for whom paying the assessment would be a financial hardship were not the ones paying on the installment plan – they were the ones in the pre-existing financial-assistance program. The evidence further showed that many of the people who paid in full – such as Owen and Evelyn Cox, the named plaintiffs in the federal action – were people on a fixed income who actually took out home-equity loans to pay the full assessment up front. *Id.* at 12-13. Choosing to pay the

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sewage assessment up front instead of taking the City's low-interest loan is not evidence of wealth – it is simply evidence that property owners took one kind of loan rather than another one.

Indeed, accepting this kind of illogical and factually groundless *post hoc* justification for a classification would eviscerate this Court's rule against arbitrary classifications and naked favoritism. It could *always* be asserted that one group of people is financially worse off than another. Insurance companies based in Alabama might have fewer financial resources than insurance companies based outside of Alabama, but that possibility did not give this Court pause in *Metropolitan Life Insurance*, 470 U.S. 869. People who moved to Alaska before 1959 might be poorer than people who moved to Alaska after 1959, but the Court did not feel obligated to make that assumption in *Zobel v. Williams*, 457 U.S. 55. People who purchased cars while residents of Vermont might be poorer than people who purchased cars before moving to the state, but that imaginary justification was not put forward by any of the Justices who heard *Williams v. Vermont*, 472 U.S. 14. If a fact-free assertion that "this group of people might be poorer" is sufficient to create a rational basis for a classification, each of those cases (indeed, *every* case about disparate financial treatment) should have come out in the government's favor. This Court should reaffirm the rational-basis test's requirement of a factually grounded logical connection and reject the unsupported – and insupportable – notion that the different

tax rates charged to Indianapolis property owners here had any connection whatsoever with those owners' financial means.

CONCLUSION

The heart of meaningful judicial review is the exercise of independent judgment rather than blind deference to legislative action, however arbitrary. The Indianapolis Supreme Court's decision below falls short of that standard and contravenes this Court's rational-basis precedents, which must be applied in light of their holdings rather than reduced to cherry-picked *dicta* presenting a caricature of judicial review that amounts to little more than a rubber stamp. The judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *et al.*,
Petitioners,

v.

CITY OF INDIANAPOLIS, *et al.*,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF FOR THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI [1]

The national associations representing state and local governments and governmental officials that join this brief support this Court affirming the Indiana Supreme Court's decision. The members of these associations have the authority to forgive debt citizens owe to state and local government and to make—and change—policy decisions related to infrastructure financing. The Indiana Supreme Court ruled that the City of Indianapolis's decision to forgive the debt of sewer installment payers was subject to—and passed—rational basis review. Further tightening the equal protection standard applied to debt forgiveness and policy changes at the state and local level would rob state and local officials of the discretion they need to provide good governance at the lowest possible cost.

Amici are as follows:

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 of appointed chief executives and assistants serving cities, counties, towns, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and it regularly submits briefs amicus curiae to this Court, in cases that, like this one, raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

SUMMARY OF THE ARGUMENT

This case is a classic example of no good deed going unpunished. The City of Indianapolis forgave the debt of those who paid for sewer connections in installments to relieve a financial burden on its residents least able to pay when the City changed how it financed sewer upgrades. Instead of being applauded for its generosity, the City was sued for allegedly violating the equal protection rights of those who paid for their sewer connections upfront because they did not receive a refund.

This Court should not second-guess a state or local government's decision to forgive debt, particularly when everyone got what they paid for. When a state or local government makes a policy change, some may be favored while others may be disfavored. This is a foregone conclusion, not unconstitutional discrimination. The City in this case relied on a number of rational reasons for forgiving the debt of installment payers—helping less prosperous residents, preserving limited government resources, and administrative efficiency. If these reasons fail rational basis review, numerous economic policy decisions of state and local government may be challenged as unconstitutional. Finally, infrastructure finance is complicated and often needs modification. This Court may discourage state and local government from making much needed changes to infrastructure financing if it invalidates the City's decision in this case.

ARGUMENT

I. Courts should not second-guess state and local governments' decisions to forgive citizens' debts.

State and local governments plan for the long term, particularly when they undertake complex and expensive infrastructure projects. They need certain, stable revenue streams *and* flexibility to modify policies to meet changed conditions. Given this need for flexibility, this Court should not second-guess policy changes made by state and local government in connection with government programs and infrastructure improvements, even if the results are not perfectly equitable.

In this case, the City of Indianapolis made a policy change (by action of its City-County Council, endorsed by its Mayor) and abandoned the method of financing sewer service expansion under Indiana's so-called Barrett Law. It instead adopted the Septic Tank Elimination Program (STEP), which resulted in septic replacement at a lower cost to property owners served by the new sewer service. In implementing this policy change, the City forgave the remaining obligations of those who had elected to pay Barrett Law assessments in periodic payments, and the City gave no refund to those who paid the assessments in a lump sum (often many years before).[2]

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[2] Although Indiana municipalities no longer fund improvements using Barrett Law assessments, the Barrett Law is just one of many Indiana examples of a special assessment used by a municipality to fund improvements. Indiana law permits local legislative bodies to assess impact fees on new real estate developments over which they have jurisdiction. IND. CODE § 36-7-4-1311. After a local governing body has followed the

All the assessment payers received direct and exclusive benefit from Barrett Law assessments. Neighborhoods benefited from participating because Indianapolis's chronically failing septic systems left counts of bacteria like E. coli very high in ditches in some neighborhoods and because sewer connections generally improve property values.[3] All homeowners were offered a choice of either paying upfront or in installments. All were able to make a rational economic decision in their best interests. Before debt forgiveness, the upfront payers got a better deal. They avoided both interest payments and the placement of a lien on their property.

Where a state or local governmental unit is *forgiving* a debt rather than *imposing* one, courts should be particularly deferential. As this case illustrates, many valid reasons may underlie a government's decision not to collect money it is owed. Within and outside the governmental context, creditors of all

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procedure required by Indiana law, it may assess an impact fee on new development in a designated geographic area. The fee is intended to cover the cost of infrastructure improvements. *Id.* Impact fees pay for previously unneeded improvements and keep local infrastructure from being overwhelmed when new development outpaces existing services. Indiana law affords local governing bodies discretion and flexibility in determining when such fees are appropriate.

[3] *See* Jane Frankenberger, *E. coli and Indiana Lakes and Streams*, PERDUE UNIVERSITY, https://engineering.purdue.edu/SafeWater/watershed/ecoli.html#sources (last visited Feb. 1, 2012) (listing diseases associated with E. coli bacteria from leaking septic systems); Frank Delano, *Sewer Systems Raising Westmoreland Property Values*, FREDERICKSBURG (VA) FREE LANCE-STAR, Dec. 15, 2009; Marshall Allen, *Sewers Increase Home Value, Realtors Say*, GLENDALE (CA) NEWS-PRESS, May 15, 2002.

kinds forgive debt every day.[4] Recently, for example, Congress passed the Mortgage Forgiveness Debt Relief Act of 2007[5] in response to an economic downturn and widespread mortgage crisis in the United States. The Act allows taxpayers who had mortgage debt forgiven in calendar years 2007-2012 on a loan of $2 million or less for a principal residence to exclude that debt forgiveness from their taxable income.[6] Previously, the canceled amount on such a debt had been taxable. Congress's refusal to tax mortgage debt forgiveness during a five year period per the Mortgage Forgiveness Debt Relief Act, like the debt forgiveness in this case, reflects a change in government policy in response to a change in circumstances.

When the government is forgiving the debts of residents where everyone got what they paid for, a courts' deference should be at its apex. No one is harmed and those disfavored have not been denied a benefit to which they were promised or otherwise entitled. In this case, any homeowner who paid any part of his or her assessment, whether in full or in some number of installments, received the benefit for which he or she paid. The City chose to forgive the

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[4] One reason a non-government creditor may want to stop collection efforts is that creditors can use the loss to lower their taxable income, which reduces the creditor's tax burden. *See Tax Consequences When a Creditor Writes Off or Settles a Debt*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/tax-consequences-settled-forgiven-debt-29792.html (last visited Feb. 1, 2012).

[5] Pub. L. No. 110-142, 121 Stat. 1803-1808 (2007).

[6] *See* Press Release, Internal Revenue Service, Mortgage Workouts, Now Tax-Free for Many Homeowners; Claim Relief on Newly-Revised IRS Form (Feb. 12, 2008), http://www.irs.gov/irs/article/0,,id=179073,00.html.

debts of those who chose to pay their assessments over time. Citizens have no reliance interest in any law or program remaining static; state and local governments change their policies and programs regularly, for a variety of valid reasons.[7] Reliance is especially unwarranted when the program lasts a long time; in this case some payment plans were for 30 years. For state and local governments to continue to meet constituents' needs, fees that generate revenue over a period of decades must be subject to changes based on current economic and political conditions.

Indiana's rethinking of Barrett Law sewer financing is not the only example of legislative re-examination of longstanding fees. Lawmakers periodically re-evaluate all kinds of revenue generating structures. For example, the Indiana General Assembly recently considered legislation that would eliminate licensing requirements and fees for a variety of now-licensed practitioners, including cosmetologists and private investigators. Some of these currently licensed workers likely invested money in training or tuition to meet licensing requirements. At a minimum, some currently licensed workers have paid licensing fees for as long as they have practiced their profession. But Indiana's Regulated Occupations Evaluation Committee, charged by the Indiana General Assembly with evaluating regulated professions, has recommended that these licensing requirements be

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[7] *See, e.g.*, Chris Roberts, *San Francisco Suspends Medical Marijuana Licensing Program Indefinitely*, SFWEEKLY.COM BLOG (Jan. 25, 2012, 4:17 PM), http://blogs.sfweekly.com/thesnitch/2012/01/breaking_in_reversal_san_franc.php (San Francisco's suspended its medical marijuana licensing program indefinitely due to uncertainty over whether it is legal).

rescinded.[8] This recommendation was made despite the fact that Indiana's Legislative Services Agency concluded that licensing fees generate net revenue for the State.[9] In other words, the Indiana General Assembly may determine that times have changed and so must the state licensing law, despite the investment some have made in fees and the perceived break that latecomers to affected professions will receive. This is one of countless examples in every state and locality of periodic re-evaluation and change to policies and programs that benefit some and not others.[10]

In short, state and local governments frequently make policy changes that have disparate effects on groups of citizens. Concluding that these discretion-

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[8] *See* REGULATED OCCUPATIONS EVALUATION COMMITTEE, REGULATED OCCUPATIONS RECOMMENDATIONS REPORT (2011), http://www.in.gov/pla/files/Regulated_Occupations_Recommendations_Report_12_16_2011.pdf.

[9] *See* LEGISLATIVE SERVICES AGENCY, FISCAL IMPACT STATEMENT H.B. 1006 (Jan. 6, 2012), http://www.in.gov/legislative/bills/2012/PDF/FISCAL/HB1006.001.pdf.

[10] *See, e.g.*, Gail Schontzler, *Recession's Silver Lining: Taxpayers Get Break on New School Cost*, BOZEMAN DAILY CHRONICLE, June 22, 2011, http://www.bozemandailychronicle.com/news/education/article_fdd9dc44-9c8d-11e0-a534-001cc4c03286.html (school board asked taxpayers for more money than it ultimately needed to build a school; current homeowners will get the benefit of a lower property tax mil in the next year; those who paid higher taxes in years prior to pay for the school—who are not necessarily the current homeowners—get no refund); Jeff Swiatek, *City to Limit Fee Hike for Business Licenses*, INDY.COM, May 6, 2010, http://www.indy.com/posts/city-to-limit-fee-hikes-for-business-licenses (when the Mayor of Indianapolis formed a new Department of Code Enforcement to consolidate functions in one department, licensing fees that had not been examined in decades were raised).

ary decisions fail equal protection analysis would unduly constrict state and local officials' freedom to change outmoded policies in favor of newer more efficient and effective strategies.

II. The City's reasons for forgiving installment-plan debts while not refunding lump sum payments for sewer access pass rational basis review.

So long as this Court can conceive of *any* plausible reason for the City's classification of property owners, can identify supporting "legislative facts" the City *may* have considered true, and can discern a more than arbitrary or irrational relationship between them, there is no violation of equal protection under rational basis review. *See Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 109 (2003). Equal protection analysis does not invite "courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). And a classification does not violate the Equal Protection Clause because it lacks precision or causes some inequality. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Fitzgerald*, 539 U.S. at 108-09 (explaining that rational basis review requires only a non-arbitrary relationship between the classification and its goals).

If the City's debt forgiveness in this case failed to meet rational basis review, then numerous state and local government economic decisions will be called into question, and the bar for complying with equal protection will be set too high. The City met its equal protection burden in this case. State and local government have a legitimate interest in reducing financial hardship for middle and low income residents, preserving government resources, and eliminating

administrative burden. These interests are—separately and together—rationally related to forgiving the debt of installment payers in this case.

1. Helping those in need reflects a basic and universally recognized function of government.[11] If equal protection does not allow state and local governments to adopt economic policies that benefit middle and lower income citizens, or even makes adopting such policies more difficult, then numerous federal, state, and local government programs may be challenged as unconstitutional. Everything from direct services (e.g., public health clinics, more bus routes in low-income neighborhoods) to grants (e.g., Pell grants) to need-based tax and welfare schemes (e.g., progressive tax schemes, heating subsidies, food stamps) to tax and investment incentives to locate businesses in economically distressed areas offered by every level of government favors poor and middle income citizens. This Court should not cast doubt on addressing the needs of lower-income citizens as a rational basis for governmental action at all levels, given the long-standing nature and wide spread acceptance of this practice.

The City's decision in this case to forgive installment payers' debt was rationally related to its stated

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[11] *See, e.g., NPR/Kaiser/Kennedy School Poll, Poverty in America*, NPR ONLINE, http://www.npr.org/programs/specials/poll/poverty/ (last visited Feb. 1, 2012) ("[P]eople [surveyed about poverty] want the government to try [to help poor people]—especially when it comes to programs designed to help people who are trying to help themselves. Large majorities support expanding job-training programs (94%), improving public schools in low-income areas (94%), increasing tax credits for low-income workers (80%), and expanding subsidized day care (85%) and subsidized housing (75%).").

goal of easing the financial burden of sewer conversion on poor and middle class property owners. The City could reasonably conclude that property owners able to pay the entire sewer connection fee at once had greater financial resources than those who chose to spread the same obligation over 20 or even 30 years. The City could rationally—if imprecisely—advance its goal by subsidizing the debtor landowners. *See Fitzgerald*, 539 U.S at 110 (the relationship of the classification to its goal need only be "not so attenuated as to render the distinction arbitrary or irrational") (internal citations omitted).

2. Structuring policies to preserve limited financial resources is another legitimate government interest that is rationally related to not refunding past payments when outstanding debts for the same item are forgiven. *See Bowen v. Gilliard*, 483 U.S. 587, 598-99 (1987) (decreasing federal expenditures is a legitimate Congressional goal). State and local government financial resources are finite but the needs are great. As state and local governments are tasked with making difficult policy choices about how to spend money, they should be able to preserve limited resources for the most important projects.

In this case, the City acted to preserve scarce resources urgently needed for a newer, more far-reaching sewer financing system. Through the STEP program, adopted in conjunction with termination of Barrett Law financing, the City could increase sewer construction, promoting both environmental progress and public health. That the City stood to benefit from federal government incentives to upgrade and expand municipal sewer systems reflects the national significance of these objectives. So limiting subsidy payments to debtor property owners rationally re-

lated to the City's interests in preserving resources for other priorities.

Because policy decisions are complex, especially when there are economic consequences, state and local governments typically have many reasons for making any policy decision. And various policy-makers' reasons may diverge, even when they support the same decision. To reflect this reality, all the reasons state and local governments rely on should be considered in total in equal protection analysis. As this Court has explained, "not every provision in a law must share a single objective"—most laws, in fact, balance different or even contrary ends while still serving "the general objective when seen as a whole." *Fitzgerald*, 539 U.S. at 108, 109.

So in this case the City could rationally decide that restricting its Barrett Law debt forgiveness balanced competing goals of ameliorating financial hardship among lower and middle-class property owners, improving public health, and preserving scarce financial resources. The City could even weigh related goals such as stemming foreclosures in the struggling neighborhoods often targeted for sewer construction. Indeed, the City's decision to only forgive debt reflects a quintessential policy choice. It is precisely the balancing of legitimate objectives that equal protection analysis does not second-guess. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981) ("States are not required to convince the courts of the correctness of their legislative judgment"); *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.").

3. Minimizing administrative burdens also is a legitimate state and local government interest that should not be dismissed in rational basis analysis. *See, e.g.*, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937). Administrative demands figure among the most basic concerns in undertaking or continuing any government program. State and local government should be able to make the same common sense cost-benefit calculations that individuals, businesses, and non-profits make every day when deciding what projects to pursue and forgo. In fact, rational basis review requires even less than a well-documented cost-benefit analysis. *See Beach Communications, Inc.*, 508 U.S. at 315 ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

Thus, the City could forgive Barrett Law debt to eliminate the administrative costs of continuing to collect monthly payments and monitoring and preserving liens for thousands of property owners involved in more than 40 Barrett Law projects. These administrative costs would have included both the necessary employee hours (e.g., mailing and processing invoices, tracking payments and delinquencies, imposing and enforcing liens) and physical resources (e.g., equipment to perform these tasks and maintain accurate records). The City would need to invest hundreds of thousands of dollars in updating failing information systems software merely to continue tracking Barrett Law debts.[12] In calculating administrative costs, the City could include Barrett

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[12] Aff. of Charles White ¶ 13, Dkt. #57-3, *Cox v. City of Indianapolis*, S.D. Ind. No. 1:09-cv-435 (S.D. Ind. June 14, 2010) (case related to *Armour*).

Law's intangible costs, such as diverting administrators from other goals that are equal or more significant.

Finally, this Court rejecting in this case the legitimate reasons rationally related to eliminating installment payers' obligations could have a paralyzing effect on state and local government. Virtually any simplification or modernization of an economic program creates winners and losers. The City's transition to the lower sewer connection fees of STEP, for example, favors STEP assessment-payers over Barrett Law assessment-payers. Any government decision to collapse a graduated benefit scheme into fewer categories of beneficiaries would help some and harm others. And even seemingly innocuous decisions to abandon license or permit requirements will disfavor those who have paid government fees. Concluding that inevitable and justified inequalities violate equal protection could perversely shackle state and local government to antiquated tax schemes and economic programs.

III. Successful equal protection challenges to infrastructure funding decisions may deter state and local government from making program revisions that promote important public interests.

State and local governments shoulder most of the nation's burden to modernize infrastructure. Citizens expect state and local government not only to maintain existing infrastructure, but to champion improvements that promote safety, health and recreation, and economic development. Infrastructure

financing is complex.[13] It is driven by many policy interests and practical realities that sometimes compete or even collide. Some funding mechanisms may not take in enough revenue to cover program costs. Others may impose hardships so obvious that relief or revision is reasonably required. Still other funding mechanisms may not actually promote the intended public interests, or worse, may undermine those interests in ways not initially anticipated. So state and local government must examine constantly whether infrastructure financing should be changed.

Revisions to infrastructure funding decisions should be informed by trial and error, public input, and changes in circumstance and technology. Citizens, who elect state and local government leaders to make these decisions, want progress and also care about their pocketbooks. Through public participation and at the ballot box, citizens have the ultimate say in the delicate balance state and local government officials strike in making infrastructure program financing decisions.

Against that backdrop, Petitioners characterize the City's decision to move from Barrett Law financing to the STEP program as creating unfair tax treatment between similarly situated taxpayers. Yet that portrayal is so narrow it obscures the context of the City's decision. The decision to abandon Barrett Law was not designed to confer a benefit on one group of taxpayers over another similarly situated group. Nor was it made just in the narrow context of the Petitioners' Brisbane-Manning neighborhood. Rather,

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[13] *See generally* NEIL S. GREGG, INFRASTRUCTURE FINANCE: THE BUSINESS OF INFRASTRUCTURE FOR A SUSTAINABLE FUTURE (2010).

the City's decision was designed to modernize its program of funding sewer improvements. In short, the City wanted to move from the old to the new. That there were consequences—even differential ones—to citizens who had selected different payment options prior to the program change is a truism about the legitimate and inevitable effects of program changes, not unconstitutional discrimination. A broader view of the City's decision in this case illustrates that this Court second-guessing one aspect of changing from Barrett Law to STEP financing may discourage other state and local governments from changing infrastructure funding needed to make critical infrastructure improvements.

1. Public Health

This Court should be reluctant to find an equal protection violation in a change to a program that serves critical public health goals. The principal reason the City continues today to convert to sewer systems from septic systems is the negative public health consequences of failing septic systems in older neighborhoods. Failing septic systems breed disease. When septic systems fail, sewage particulates leech to the top of soil in residential yards and run into ditches.[14] According to evaluations performed by Indianapolis's local health department, more than 7,400 septic systems in this county are failing, and more than 20,000 additional septic systems need evaluation.[15]

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[14] *See Diseases Involving Sewage*, INDIANA STATE DEPARTMENT OF HEALTH, http://www.in.gov/isdh/22963.htm (last visited Feb. 1, 2012) (listing and describing many of the diseases caused by contact with sewage).

[15] *See* Citizens Energy Board Meeting, Minutes of June 2, 2011 Meeting Regarding the Basics of Financing the STEP

That a large city like Indianapolis in 2012 still has neighborhoods on septic systems underscores the need to not restrict local governments' modernization efforts even if they are not perfectly equitable.

2. Septic Conversions

Septic conversions are happening nationally.[16] It is important that courts defer to changes to septic conversion financing so this national trend may be advanced. Communities with septic conversion programs need the flexibility to change the subsidy/benefit component of such programs. The U.S. Environmental Protection Agency (EPA) is pursuing enforcement efforts all across the country to clean up outdated, unhealthy sewer systems and wastewater treatment plants.[17] Many sewer upgrade projects are

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Program at 7, http://www.citizensenergygroup.com/pdf/directors/6-2-11.pdf.

[16] Septic conversions are made for public health reasons when septic systems fail, as in the case of Indianapolis. In the mid-Atlantic states they are made for nutrient reduction reasons. The Environmental Protection Agency maintains the Mid-Atlantic Nonpoint Source Pollution Initiative that touts septic to sewer conversions as a success in reducing undesirable nutrient levels. *See Inland Bays, Delaware—Nonpoint Source Success Story*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/reg3wapd/nps/success/de_inland_bays.htm (last visited Feb. 1, 2012) ("Significant reductions [in nutrients such as nitrogen and phosphorus] were also shown through the removal of over 16,000 septic systems and conversion to central sewer systems.").

[17] *See Keeping Raw Sewage and Contaminated Storm Water Out of Our Nation's Water*, ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/compliance/data/planning/initiatives/2011sewagestormwater.html (last visited Feb. 1, 2012) (review EPA's electronic map entitled "Progress on Compliance and Enforcement Activities").

part of federal Clean Water Act consent decrees entered into by EPA, state environmental regulators, and local governments all over the country.[18] Indeed, because of the environmental and public health benefits, EPA routinely approves septic conversion projects as supplemental environmental projects that offset fines and penalties otherwise imposed as part of Clean Water Act consent decrees with local governments.[19] Simply put, environmental regulators not only support projects like the one at issue in this case, they require them. Local governments need flexibility to finance and implement them—and then change them when it is sensible to do so.

Regulatory requirements imposed on local governments make financing public improvements for the country's aging infrastructure increasingly complex. Financing wastewater treatment improvements typically now involves a mix of wastewater collection and treatment use rates and charges, general government taxes, low or no-interest state and federal loans, and revenue derived from public-private partnerships to operate public works.[20] In the Barrett Law context,

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[18] For the list of Clean Water Act Consent Decrees currently lodged in federal courts, *see Proposed Consent Decrees*, DEPARTMENT OF JUSTICE, http://www.justice.gov/enrd/Consent_Decrees.html (last visited Feb. 1, 2012).

[19] *See* ENVIRONMENTAL PROTECTION AGENCY, BEYOND COMPLIANCE: SUPPLEMENTAL ENVIRONMENTAL PROJECTS (2001), http://www.epa.gov/compliance/resources/publications/civil/programs/sebrochure.pdf.

[20] *See* RICH ANDERSON, WHO PAYS FOR THE WATER PIPES, PUMPS AND TREATMENT WORKS? – LOCAL GOVERNMENT EXPENDITURES ON SEWER AND WATER – 1991 TO 2005, UNITED STATES CONFERENCE OF MAYORS, http://www.usmayors.org/urbanwater/07expenditures.pdf (detailing aggregate expenditures from state and local revenues); *Clean Water State Revolving Fund*,

the City typically used the lump-sum payments to pay some of the project construction costs and had to finance the rest with debt instruments serviced by the installment payments. In many cases, the periodic Barrett Law payments were difficult to collect from low-income homeowners. Petitioners' simplistic view that they have been discriminated against must be re-evaluated in light of the complexity of funding infrastructure upgrades.[21]

And the bubble of Petitioners' simplistic view is burst by an example only slightly different than this case. Suppose a local government in a watershed prone to flooding required homeowners to pay a

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ENVIRONMENTAL PROTECTION AGENCY, http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm (last visited Feb. 1, 2012); IND. CODE § 5-23-1-1 (establishing public-private agreements for operation of governmental facilities); ROGER HARTMAN, CONTRACTING WATER AND WASTEWATER UTILITY OPERATIONS, REASON FOUNDATION (1993) (showing that for two decades, "[m]ounting regulatory pressure, scarcity of competent personnel, and significant budgetary problems are leading more and more communities to consider private-sector contract operations and maintenance (O&M) of water and wastewater facilities").

[21] Some communities around the country have private sewer lateral repair and replacement subsidy programs designed to eliminate infiltration and inflow of storm water into septic systems, which causes sewer overflows. *See* CAROLINE ELLERKAMP & ERIN FIFIELD ET. AL, RESIDENTIAL SEWER LATERAL MAINTENANCE PROGRAM ANALYSIS FOR THE CITY OF MILWAUKEE, UNIVERSITY OF WISCONSIN-MADISON (2010), http://v3.mmsd.com/AssetsClient/Documents/PrivatePropertyI&I/La%20Follette%20Sewer%20Report.pdf (among other things, surveying 78 cities' programs for sewer lateral maintenance). These programs can be so individualized and specific to hydrological and sewer capacity factors that they would be especially vulnerable to attack under the Equal Protection Clause if local governments are not free to revise the financing of their programs based on trial and error and new engineering.

special assessment for a badly needed flood mitigation capital project.[22] The local government decides to give affected homeowners a choice; they may pay the assessment in a lump sum or pay over time. As would be typical, the local government uses the lump sum payments to pay for part of the construction costs and finances the balance, with the expectation that it will use the future revenue stream from periodic payers to service the debt. A year later, the state legislature makes flood control in that local government's watershed a top funding priority in the state's new budget. As a result, the state pays the City's outstanding debt incurred for the project.

Under Petitioners' view, the local government must either: (1) continue to accept the periodic payments from residents who elected to pay over time even though the local government has no need for such revenues, or (2) devise a calculation to use the continuing payments to reimburse homeowners who paid by lump sum. Some local governments may choose to pursue one of those options for policy reasons. But the best view of the Equal Protection Clause is that the local government is not required to choose either option. Otherwise, federal courts are put in the uncomfortable position of second-guessing state legislative appropriators.[23] The best way to

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[22] Special assessments are one way in which flood control projects are financed. For an analysis of flood control project financing methods considered by local governments, *see* SCOTT CHINN & DAVID GOGOL, STUDY OF SHORT AND LONG TERM SOLUTIONS TO FLOOD CONTROL GOVERNANCE IN NORTHWEST OHIO, BAKER & DANIELS (Feb. 2010), http://floodpartnership.org/media/FloodControl_Governance.pdf.

[23] The Indiana Supreme Court has recognized that separation of powers principles under the Indiana Constitution makes state legislative appropriation decisions "unusually unsuitable"

view this example, and Indianapolis's decision to adopt STEP, is as a rationally based infrastructure funding program change—one just like so many such decisions in a complex system that requires matching scarce revenues with local and state government priorities.

3. Other Programs

Not only would accepting Petitioners' view trouble policymakers responsible for financing traditional infrastructure like sewers and flood control projects, but it also would straightjacket even-more-complex infrastructure financing schemes for fiber optics, wireless technology, and green infrastructure, which are rapidly developing and ever changing. For example, the Federal Communications Commission's National Broadband Plan encourages partnerships between local government and broadband providers to make local infrastructure, including sewers, available for broadband expansion and utilization.[24] Some projects locate fiber optic cable in sewer lines or other rights-of-way. Homeowners connected to the cable pay fees to the local governments or the broadband

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for judicial review. *Bonney v. Indiana Finance Authority*, 849 N.E.2d 473, 482 (Ind. 2006). And principles of federalism likewise ought to be considered. As is true of dormant commerce clauses cases, scrutinizing state government appropriations decisions and local government infrastructure funding programs is an inquiry "ill suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

[24] *See National Broadband Plan*, FEDERAL COMMUNICATIONS COMMISSION, http://www.broadband.gov/plan/6-infrastructure/ (last visited Feb. 1. 2012). Wireless and fiber-to-home projects sponsored in part by state and local governments that cater to unserved or underserved populations were allocated more than $7 billion American Recovery and Reinvestment Act funds.

provider working in partnership with the local government. What if a local government partnered with a developer or a broadband provider to connect a neighborhood under an infrastructure financing arrangement for which the homeowners paid a fee to the government-owned utility? Later, if the local government received federal funds to do the same thing in the adjoining neighborhood and did not charge a user fee, residents in the first neighborhood should not possess a viable equal protection claim because of the program change. The relationship among the federal government, local governments, and broadband providers in expanding access to broadband and other services is fostered by permitting local governments to freely change fee structures that support infrastructure improvements.[25]

4. Remedial Conundrums

Few if any state and local governments interested in changing an infrastructure financing program will have the funds to retrospectively reimburse residents who electively paid a fee in full under the prior program. So invalidating the City's decision in this case to forgive assessment debt of residents who chose to pay over time incentivizes the City to simply not forgive the debt. The City would implement changed financing only for new projects, would have

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[25] *See* Interview by Dennis Scholl with Graham Richard, former Mayor, as part of the Digital Revolution and Democracy Series, http://www.knight foundation.org/blogs/knightblog/2011 /10/27/focas-series-graham-richard/ (former Ft. Wayne, Indiana, mayor Graham Richard discussing "smart city bonds" based on a "partnership with local, private-sector companies [to] provide[] the financing to install fiber optic systems that help make smart technology that runs your city better and faster").

to administer dual, parallel financing programs, and no one would get a break.

Another remedial conundrum if the Indiana Supreme Court's decision is reversed is if the City must refund payments to lump-sum payers because it forgave the assessment debts of installment payers, to whom would and should that relief be granted? Some previous Barrett Law projects had 20- or 30-year payoff periods. Residents who paid their Barrett Law obligations in a lump sum 30 years ago may not be the current owners or residents of the improved properties and may no longer be alive.

Petitioners argue that the Equal Protection Clause would not be satisfied by a "leveling down" where periodic payers continue to pay as a remedy to avoid alleged discrimination against lump-sum payers, but their argument misses the point. State and local governments will be deterred from making decisions in the public interest if they cannot revise infrastructure funding programs based on changed conditions and priorities. Courts second guessing routine, necessary line-drawing questions will paralyze local and state governments in future policymaking. State and local governments need flexibility to modify program and infrastructure funding schemes in a timely manner without fear of legal intervention when circumstances change.

CONCLUSION

To permit state and local governments the necessary flexibility to implement and change policies, especially those governing infrastructure improvements, this Court should affirm the judgment of the Indiana Supreme Court.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *et al.*,
Petitioners,

v.

CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

IMLA is committed to protecting its members' flexibility under federal law to manage their tax systems and to develop innovative tax and collection policies consistent with the requirements of equal protection. Petitioners, however, urge this Court to adopt an interpretation of the Equal Protection Clause that would unduly constrict the policy choices available to municipal governments. IMLA has a strong interest in ensuring that this Court continues to recognize the legitimate budgetary and administrative concerns that animate policymaking deci-

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[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

sions and trade-offs that local governments routinely must make.

INTRODUCTION AND SUMMARY

The Equal Protection Clause of the Fourteenth Amendment prohibits a state or local government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The command of equal protection is not a prohibition on any and all classifications that may result in differential treatment, but "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). Where the classification at issue does not impinge upon a fundamental right or differentiate among citizens on the basis of a suspect characteristic, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The classification under review in this case—a decision by the City of Indianapolis ("City") to provide tax relief on a prospective basis only—plainly satisfies this lenient standard. Prior to 2005, the City funded sewer connection projects under Indiana's Barrett Law, a mechanism that allows cities to finance certain public improvements by apportioning their costs among all benefitted property owners. Ind. Code § 36-9-39-15. Property owners could pay their assessments entirely up-front or in ten-, twenty-, or thirty-year installment plans. *Id.* § 36-9-37-8.5. In 2005, however, the City elected to abandon Barrett Law financing in favor of a different funding method called the Septic Tank Elimination Program ("STEP"). Pet. App. 4a-5a. In order to expedite the transition, the City forgave all outstanding balances on the more than forty Barrett

Law projects in existence at the time but—in light of the significant administrative costs associated with refunding amounts already paid—declined to issue refunds of prior payments, including to those who had paid their assessments in full. J.A. 71-72. While those in this latter group (including Petitioners[2]) may feel that they were treated unfairly, there can be no doubt that the City's decision was based upon, and rationally related to, legitimate fiscal considerations and thus did not violate the constitutional guarantee of equal protection.

Perhaps recognizing that the City's decision could not be challenged as unrelated to these fiscal considerations, Petitioners instead make the extraordinary claim that those concerns were themselves somehow illegitimate. They assert that a government has no valid interest in "not emptying its coffers" or "reducing its administrative costs," and that a classification based upon such economic considerations is justifiable only to the extent that it bears a rational relationship "to some *other* legitimate objective." Petrs. Br. 41, 43 (emphasis in original). This supposed rule—which, in all events, is satisfied in this case, see *infra* Part II—contradicts decades of this Court's precedent and ignores the fundamental realities of policymaking. If it were to be adopted, the result would be to cripple local governments' ability to provide fiscally responsible benefits and services for their citizens.

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[2] Petitioners are a group of homeowners from within a single Barrett Law project—the Brisbane/Manning Barrett Law Sanitary Sewers Project—who each paid his or her entire $9,278 assessment up-front in 2004, but who saw their neighbors receive prospective tax forgiveness that covered most of the cost of their assessments. Pet. App. 3a; Petrs. Br. 2.

Indeed, a rule that required the City to refund previously made payments, if applied uniformly to all Barrett Law projects, would have created an administrative morass and raised a host of issues at least as difficult as the decision of whether to forgive or refund project payments at all. These include, among many others, whether to refund payments for all Barrett Law projects or only for those projects commenced more recently (and, if so, how far into the past), whether to offer refunds only to current property owners or also to prior owners who made Barrett Law payments (and, if so, how to locate those individuals), and how to issue or allocate refunds in circumstances of joint ownership, divorce, or death. None of these options comes without cost, and all implicate a range of burdens—financial, administrative, and otherwise—that would have impacted the City's budgeting policies and priorities for years in the future. These costs, and the complex decision points they entail, fully justify the City's approach in this case. More importantly, they confirm that the decision at issue is quintessentially a policy question that should be resolved through the political process at the ballot box, not though litigation at the courthouse.

The Indiana Supreme Court properly rejected Petitioners' claims as fundamentally inconsistent with this Court's equal protection jurisprudence, and correctly concluded that the City's decision was rationally related to a legitimate interest in preserving municipal resources. That judgment should be affirmed.

ARGUMENT

I. COST IS A PERMISSIBLE CONSIDERATION FOR A CITY DETERMINING THE SCOPE OF ITS PROGRAMS.

This Court has long and consistently held that interests in the preservation of financial resources, *without more*, may support a municipality's decisions regarding tax policy or the allocation of regulatory benefits and burdens. See, *e.g.*, *FCC* v. *Beach Commc'ns*, 508 U.S. 307, 317 (1993). It has recognized in numerous opinions that "[a]dministrative convenience and expense in the collection or measurement of the tax are *alone* a sufficient justification [for a tax classification]," *Carmichael* v. *S. Coal & Coke Co.*, 301 U.S. 495, 511 (1937) (emphasis added), and "afford *adequate grounds* for imposing a tax on a well recognized and defined class," *Fernandez* v. *Wiener*, 326 U.S. 340, 360-61 (1945) (emphasis added). This conclusion follows from the principle that, because fiscal resources are by nature limited and finite, municipalities must have wide latitude in deciding how they should be allocated. *Lyng* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988).

Petitioners fail even to acknowledge this precedent, let alone to explain how their approach can be reconciled with it. Nor could they, as their position is directly contrary to those cases. Their approach would, for example, preclude a municipality from excluding certain individuals or businesses from a particular tax based on its judgment that the tax is simply too expensive to collect from those entities, see Petrs. Br. 41-45, whereas this Court has upheld precisely this type of arrangement against an equal protection challenge. See, *e.g.*, *Carmichael*, 301 U.S. at 510-11. Likewise, a municipality would be consti-

tutionally barred under Petitioners' rule from providing a benefit only to those for whom it is most affordable to do so, whereas (again) this Court has expressly stated that government may, consistent with equal protection guarantees, "address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.'" *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972) (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)). A government's interest in making fiscally sound decisions—like any other legitimate interest—can support a chosen classification to the extent that such classification "rationally further[s]" the government's economic purpose. *Nordlinger*, 505 U.S. at 10.[3]

In no decision has this Court ever held that a classification cannot be drawn based on fiscal considerations. Where this Court has rejected such interests as justifying a particular provision, it has done so only after determining that the classification bore no reasonable relationship to the government's stated interest. *E.g.*, *Zobel* v. *Williams*, 457 U.S. 55, 61 (1982) (concluding that the State's interest in "prudent management" of its funds was "not rationally related to the distinctions" made).[4]

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[3] It would hardly offend notions of rationality if, for instance, a municipality that wished to provide sewer connections to its residents, but lacked the funds to connect every property in its jurisdiction, instead chose to connect only those properties for which it was most financially feasible to do so.

[4] *See also Williams* v. *Vermont*, 472 U.S. 14, 24 (1985) ("The purposes of the statute would be identically served, *and with an identical burden*, by taxing each [group].") (emphasis added); *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869, 882-83 (1985) (concluding that the State's chosen classifications did nothing to further its purported interest in encouraging capital invest-

This was the case in *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336 (1989), on which Petitioners heavily (and mistakenly) rely. That decision held that a county tax assessor's practice of adjusting assessed property values upon sale, and not otherwise, was not rationally related to the government's stated policy goal of ensuring that all property assessments reflect current market value and that therefore the practice violated the Equal Protection Clause. *Id.* at 339-46. *Allegheny Pittsburgh* clearly *did not* hold that the tax classification at issue was *per se* impermissible or might not be justified under different policy goals—for instance, an interest in preserving resources and avoiding administrative burdens by requiring an assessment only upon a property sale. Indeed, the Court held just three years later that the same assessment practice was permissible and advanced a variety of legitimate governmental interests. *Nordlinger*, 505 U.S. at 14-15.

It is thus clearly not the case, as Petitioners suggest, that if cost considerations are deemed a legitimate interest for equal projection purposes they could then justify "*every* tax—no matter how arbitrary—[because] a desire to raise or preserve revenue is presumably the reason why taxing authorities impose taxes in the first place." Petrs. Br. 43. The relevant question is not the tautological one of whether the imposition of "taxes in the first place" will increase revenue; it always will. Rather, the question is whether the *particular classification* used to determine the incidence or extent of a tax is itself rationally related to the government's interest in

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ment); *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982) (rejecting the State's purported interest in conserving its educational funds by withholding money from students that were "basically indistinguishable" in terms of cost and difficulty to educate).

saving resources. See, *e.g.*, *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527 (1959).

Ultimately, Petitioners' novel approach rests on the notion that some additional limiting principle is necessary to block the path of an implausible parade of horribles that includes tax classifications based on house numbers, hair color, and the alphabet. Petrs. Br. 43, 45. Such distinctions epitomize arbitrariness and have nothing to do with cost (even if their deployment would indeed save the government resources). There is no reason or need to lump such absurdities together with classifications based on differences of real fiscal consequence.[5]

II. MUNICIPAL GOVERNMENTS HAVE LEGITIMATE AND COMPELLING REASONS FOR DIFFERENTIATING BETWEEN TAX REFUNDS AND PROSPECTIVE TAX RELIEF.

The classification at issue in this case—between refunds of payments previously made and forgiveness of payments not yet due—is a manifestly reasonable one that advances a variety of legitimate governmental interests. To be sure, the fact that the City provided differential payment schedules within each Barrett Law project meant that some individuals received tax relief while their neighbors received none. But the Equal Protection Clause imposes no "iron rule of equal taxation," *Bell's Gap R.R.* v. *Pennsylvania*, 134 U.S. 232, 237 (1890), requiring that a property owner may pay no more in taxes than a neighbor. To the contrary, this Court has upheld

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[5] In all events, because the classification utilized by the City here is eminently reasonable and anything but random, *see infra* Part II, this Court has no need to explore such outer limits in this case.

tax classifications that "create[ ] dramatic disparities in the taxes paid by persons owning similar pieces of property." *Nordlinger*, 505 U.S. at 6. The relevant question is whether the tax classification is "reasonable," *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), not whether it can meet impossible standards of fairness.[6] For a number of reasons, the distinction between refunds and prospective tax forgiveness easily meets the test of reasonableness.

A. Refunds Are More Expensive Than Prospective Forgiveness.

That distinction is justified, first, by financial considerations. It is virtually always more expensive for a government to refund a given amount of previously collected taxes than it is for it to forgive the same amount of taxes owed in the future. In other words, it costs more to *refund* a dollar than it does to *forgive* a dollar.

This reality is driven by two basic principles of government finance. *First*, when a tax debt is not owed to the government until some future time, the government in the meantime must forgo any interest that otherwise could be earned on the money. For that reason, a tax debt payable in a future year has a present value that is less than the full amount owed. See Harvey S. Rosen, *Public Finance* 221-22 (6th ed. 2002). For example, assuming an interest rate of 5%,

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[6] For example, the tax upheld in *Carmichael* imposed a tax on businesses with eight employees but not on those with seven. 301 U.S. at 510-11. Surely employers in the former category would have justifiably perceived some unfairness when comparing themselves to employers identical in every way but with one fewer employee. But such legislative line-drawing is inevitable. *See id.* at 511-12.

$105 payable one year from now has a value today of only $100. *Id.* In that situation, a decision to forgive a $105 tax owed next year would cost the government $100 today, whereas a decision to refund a $105 tax already paid to the government would require the issuance of a $105 check. Under the same principle, a decision to forgive a tax debt of over $8,000, payable over nearly thirty years, is significantly less expensive in present value terms than a decision to refund that same amount.

A government may be able to account for some or all of this difference by charging interest to those taxpayers who make payments over a course of years. For example, the City here charged 3.5% interest to those taxpayers who elected the ten-, twenty-, and thirty-year installment plans. Pet. App. 4a. In many cases, however, a government may choose, for policy reasons, to make tax installment plans available to its citizens at preferential, sub-market rates. This may have been the case here: Petitioners' *amicus* has reviewed historical interest rates and concluded that the 3.5% interest rate offered for Barrett Law financing was actually quite favorable. See Institute for Justice Br. 28. Thus, the forgiveness of outstanding Barrett Law payments, including interest, was likely still less expensive for the City than would have been refunds of the same base tax assessment.

Second, the net revenue that a government can expect to obtain from taxes not yet paid is always less than the full amount owed. In order to generate actual revenues, the government will need to expend some amount of resources on collections, both to process receipts and to pursue cases in which the taxpayer does not comply voluntarily. In addition, it is highly unlikely that the government will be able to

collect 100% of what it is owed. Each year, the government is likely to experience a "tax gap"—*i.e.*, the difference between the total amount of taxes owed to the government and the amount the government is able to collect. See Internal Revenue Serv., *Tax Gap for Tax Year 2006*, at 1 (Jan. 6, 2012), *available at* http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf. For example, for the 2006 tax year, the federal government reported a net tax compliance rate of 85.5%; similarly, California and Oregon reported net tax compliance rates of 89% and 81.5%, respectively. See *id.*; Cal. Franchise Tax Bd., *Tax Gap Plan: A Strategic Approach to Reducing California's Tax Gap* 4 (2006), *available at* https://www.ftb.ca.gov/aboutFTB/TaxGapStratPlan.pdf; Or. Dep't of Revenue, *Report on Personal Income Tax Compliance in Oregon* 4 (Jan. 30, 2009), *available at* http://www.oregon.gov/DOR/docs/800-552web.pdf.

In light of these variables, a municipal government that complies with generally recommended budget practices will plan on receiving net tax revenues at some amount less than the total amount of taxes owed. See Nat'l Advisory Council on State & Local Budgeting, Gov't Fin. Officers Ass'n, *Recommended Budget Practices: A Framework for Improved State and Local Government Budgeting* § 4.4a (1998), *available at* http://www.gfoa.org/services/dfl/budget/RecommendedBudgetPractices.pdf. As a result, a decision to forgive a given amount in future taxes owed will cause the government to lose less in expected revenues than the total amount forgiven. A refund of the same amount, in contrast, will cost the government exactly that amount.

B. Refunds Impose Budgetary Strains, Planning Challenges, And Other Administrative Burdens That Forgiveness Does Not.

The distinction between tax refunds and forgiveness can be independently justified as a means to simplify budgetary planning. Tax refunds fit much differently into governments' budgets and fiscal plans than do equivalent tax forgiveness programs. Whereas forgiveness involves the cancelation of expected future revenues, refunds require the actual expenditure of cash on hand. It is one thing to revise forecasts for a series of budgets that may be several years—or, in some cases, nearly thirty years—out. It is quite another to find the resources to make a distribution in the current year. The tax proceeds to be refunded may have already been spent, in which case a new source for the funds would need to be identified. Such was the case here. Pet. App. 19a. In the likely event that existing funds have been committed, the government would need to explore other methods of financing, such as the issuance of new public debt (*e.g.*, municipal bonds), that impose their own new costs. These difficulties will be particularly pronounced where, as here, the forgiven tax liability was to be paid in a series of installments, but the refund would be due in a single year.

Under the particular facts of this case, the payment of refunds also would have imposed significant administrative burdens, which are far from trivial and require much more than performing "basic arithmetic" and issuing checks. Petrs. Br. 44. As an initial matter, the task of setting the amount to be refunded would have required the City to balance a number of competing interests. Because the City offered installment plans of ten-, twenty-, and thirty-

year durations, each with its own payment schedule, Ind. Code § 36-9-37-8.5, there were varying amounts outstanding within a given Barrett Law project at the time the City chose to forgive outstanding debts. Before issuing refunds, the City first would have had to determine which of these amounts—if any—to set as the "baseline" for refund payments.

Notwithstanding Petitioners' claim to the contrary, the City could not have simply selected as this "baseline" the maximum amount hypothetically paid by a property owner on an installment plan (*i.e.*, someone on a ten-year plan), and then refunded to individuals who prepaid their taxes the difference between that amount and the prepayment. J.A. 15. That approach would, indeed, have been much *less* rational than the one employed by the City in this case, in that it would have based the availability and amount of tax relief not on an objective distinction related to payment status (*i.e.*, between payments previously made and payments outstanding) but on an entirely arbitrary figure that does not necessarily correlate to the amounts actually paid by any property owner.[7] Moreover, Petitioners' *post hoc* proposal offers no guidance to a governmental official trying to determine whether the requisite level of equality has been achieved. Whatever point on the spectrum the City used as a "baseline" for refunds

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[7] Notably, although the differences in payments between the various installment plans were relatively minor for the Brisbane/Manning Project, those differences would have been significantly greater for older projects. In a project with property owners in their ninth year of payments, for example, individuals on ten-year plans will have just one year of payments outstanding, whereas those on thirty-year plans will have twenty-one years worth of payments available for prospective forgiveness.

would have posed its own unique administrative challenges.[8]

After selecting a baseline, additional challenges would have remained. All claimants would have had to be reimbursed for whatever money they had paid above the City's determined baseline—amounts that would vary individually between those who paid in full and those who paid through certain installment plans. In addition, because forgiveness is less expensive than refunds, see *supra* Part II.A, the City would have had to decide whether and how to account for these differences in the amount of the refunds offered.

The task is complicated further when the full range of Barrett Law projects is considered. At the time the City decided to move away from Barrett Law financing, more than forty projects had been constructed under those terms, over the course of decades. J.A. 51. Issuing refunds to property owners in the older Barrett Law projects would have imposed substantial administrative difficulties above and beyond those discussed earlier. For example, in cases where the property has changed ownership since the payments were made, the City would have needed to

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[8] For instance, if the City chose to forgive all debts above the lowest amount that had been paid (*i.e.*, the amount under the thirty-year plans), it would have had to offer refunds both to those who paid the full assessment up front *and* to those who had paid relatively more under shorter-term installments plans. Conversely, if the City chose instead to forgive only those debts above the amount that had already been paid under the ten-year plans, it would have had to continue to collect payments from the longer-term payers until they reached that same level. Of course, if the City set the mark somewhere in between (*e.g.*, at the median amount paid) it would have been saddled with both burdens—*i.e.*, processing additional refunds and continuing payment collections.

decide whether to issue refunds to past owners and, if so, what policies and procedures it should follow in its efforts to locate them. In some instances, such as where assessments were paid by successive property owners or joint property owners who since divorced, the City would have faced the task of properly allocating refunds. In other instances, the property owner may have since deceased.

In addition, any time a government seeks to refund payments made many years in the past, it runs the risk that its own records do not extend far enough back to process the refunds. Indeed, the City apparently faced precisely this issue. See Aff. of Charles White ¶ 14, attached as Exh. C to Defs.' Supp. Cross-Motion for Summ. J. (Dkt. No. 57), *Cox v. City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010) ("White Aff.") ("The Controller's Office did not have records of Barrett Law payments and assessments prior to the early 1990s."). The cost and effort of locating these old records, combined with the difficulty of setting a payment policy in the first place, confirm that Petitioners' requested relief would have resulted in a significant and expensive undertaking for the City.[9]

C. Paying Refunds Would Undermine The City's Ability To Establish A Clean Break From The Old Barrett Law System.

The decision to distinguish between tax refunds and forgiveness is also reasonable in light of the City's stated goal to break cleanly and quickly from

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[9] In contrast, the issuance of prospective relief poses none of these challenges. The amount to be forgiven is simply the amount owed as of a certain date, based on debts currently outstanding in government records.

the old Barrett Law system. J.A. 76. Just as debt forgiveness offered many citizens tax relief, it also relieved the City of the burden of maintaining and administering collections under the Barrett Law system for years to come. *Id.* Paying refunds, however, would have directly undermined that goal by forcing the City to erect an administrative scheme to pay and process refund claims well into the future.

First, as discussed, the City would have had to establish a refund policy and to determine an amount to be repaid for each Barrett Law project. Perhaps more difficult, in establishing these policies, the City would have to determine the source of the funds to be used to support that policy. Unlike prospective relief—which affects only future budgets—these refunds would have had to be paid from current accounts, leaving the City with only two realistic options. The City could have issued new public debt to generate additional revenue, or it could have reallocated existing funds within the City's budget, which likely would have left other programs underfunded. Either choice would have had an impact lasting long beyond the fiscal year in which payments were issued.

Once reimbursement policies and funding were established, the City would have had to assume the task of actually processing individual claims for refunds. All former Barrett Law payers—from projects both new and old—would have had to be notified of the refund policy, which, again, could have been difficult depending on the age of the project, changes in property ownership, and the extent of the City's records. After processing and resolving individual claims for refunds, the City would have faced the task of hearing and resolving disputes relating to individual taxpayers' entitlements to refunds or the

accounting processes used to establish the amounts to be repaid. Such disputes easily could have entangled the City for years to come, especially if (as is almost certain) those disputes took the form of litigation.

Taken together, these requirements reflect a simple reality: If the City had issued refunds to Petitioners and all those similarly situated, it would have been compelled to continue to administer the Barrett Law system well beyond its repeal. These ongoing administrative duties would have undermined the City's goal of establishing a clean break from the outdated Barrett Law system and pursuing an expedient transition to its new methods of financing.

D. Prospective Forgiveness Removes Burdens That Refunds Do Not Alleviate.

Distinguishing between refunds of past payments and forgiveness of outstanding debts also allowed the City to avoid a number of other burdens and secure a number of other benefits. These considerations confirm, again, the rationality and reasonableness of the City's classification scheme.

Most obviously, by forgiving taxes owed in the future, the City was able to avoid the expense and burdens of collecting taxes in the future. In the case of the forgiven Barrett Law assessments, the City in some cases stood to save nearly thirty years of collection costs. In addition, because the STEP program relies on a one-time connection fee, J.A. 75, the City was able to transition immediately away from installment collections for purposes of city sewer connections.

For some governments, the burden of collecting unpaid taxes or assessments may be exacerbated by the particular features of their collection systems.

City officials have indeed confirmed elsewhere that, "[a]t the time of forgiveness, the Controller's Office was beginning to have problems with its information systems software which tracked and managed Barrett Law debts owed to the City." White Aff. ¶ 13. Had the City continued to collect the now-forgiven Barrett Law assessments, it would have had to "invest approximately $200,000 to update the information systems software." *Id.*

The City would have faced added burdens in this case because the properties at issue were subject to statutory liens pursuant to Indiana Code § 6-1.1-22-13.5. Pet. App. 4a. Although such liens provide the City insurance against default, the fact that they run with the property and are "not affected by any sale or transfer of the tract," Ind. Code § 6-1.1-22-13.5(a)(2), means that the nonpayment of outstanding assessments could ensnare the City in foreclosure and bankruptcy proceedings and cause complications in future property sales. A concern regarding these potential costs would have been particularly justified in this case based on the City's determination that tax relief was necessary to relieve burdens on "middle to lower-income participants," J.A. 75, given that lower-income communities have suffered the highest foreclosure rates in recent years. See Joint Ctr. for Hous. Studies of Harvard Univ., *The State of the Nation's Housing 2011*, at 30 (2011), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf. In contrast, taxpayers who already paid their assessments in full presented no such risk to the City, regardless of their financial conditions at the time the City made its decision to forgive unpaid Barrett Law assessments.

III. PETITIONERS' INTERPRETATION OF THE EQUAL PROTECTION CLAUSE WOULD SIGNIFICANTLY ENCUMBER MUNICIPALITIES' MANAGEMENT OF THEIR FINANCIAL AFFAIRS.

The classification employed by the City in this case, between paid and unpaid Barrett Law assessments as of a certain date, was entirely reasonable and legitimate, as discussed above. But, even if this Court were to question the particular decision here, it should reject the interpretation of the Equal Protection Clause offered by Petitioners. That interpretation, if accepted, would significantly and unnecessarily constrain the ability of municipal governments to craft sensible tax and regulatory policies.

First, holding that cost-based classifications are impermissible would cripple municipalities' ability to provide benefits and services to their citizens. Every municipality is subject to resource constraints, and any decision to offer a benefit or service—be it social welfare funding, tax relief, public sanitation, or something else entirely—raises a set of complex, interrelated questions. See *Fitzgerald* v. *Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003). These include, *inter alia*, whether to provide the benefit or service at all, how it can be financed, and the extent to which the benefit or service must be circumscribed in light of the resources available. *Id.*

The legitimacy of cost-based considerations is crucial to maintaining the ability of municipalities to address these issues and make the trade-offs necessary to set policy effectively. For example, a municipality may choose to repair one road rather than another because of differences in construction costs. It may choose to build a library in one part of

town, and not another, because the cost of development on one site is cheaper than the other. Or it may choose to reduce the welfare benefits for one group but not another because it can save more resources with the former cuts than the latter. Cf. *Lyng*, 485 U.S. at 372-73. Under Petitioners' view, any of these decisions would be subject to challenge.[10] The unfortunate reality is that a government that is unable to make such distinctions may not have the resources to expand the benefit but may instead find it necessary not to provide it at all.[11]

The rule advocated by Petitioners would implicate not just decisions regarding the allocation of benefits,

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[10] The burden imposed by such challenges would be exacerbated if this Court were to accept Petitioners' mistaken view that the relevant governmental action for equal protection analysis is only the decision to withhold a benefit or service from some, Petrs. Br. 37, and that the legitimate interests served by offering the benefit to others is therefore irrelevant, *id.* at 44. The Equal Protection Clause requires the assessment of *whole classifications*, not just the burdened side. *See, e.g., Allied Stores*, 358 U.S. at 529 (justifying tax applied only to residents based on benefits of excluding nonresidents from the tax). The tax burden of one group is the tax benefit of another; the two "are but opposite sides of the same coin." *Fitzgerald*, 539 U.S. at 109.

[11] The program at issue here provides a perfect illustration. Every member of the Board of Public Works submitted a sworn affidavit in the related federal class action stating that he or she would not have voted to forgive the outstanding assessments if doing so would have "required the City to reimburse previously paid Barrett Law payments to people who had already received the benefit of a sewer connection." Defs.' Supp. Cross-Motion for Summ. J., Exhs. D, E, F, G, H (Dkt. No. 57), *Cox* v. *City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010). If this Court were to adopt Petitioners' constricted view of costs, the boards and councils of every municipality would be faced with similar questions.

services, and taxation, but also those establishing a government's enforcement priorities. For example, a government with scarce resources for tax enforcement might choose to concentrate its efforts on those taxpayers with deficiencies above a certain threshold, based solely on the expectation that this approach will maximize the amount of revenue generated.[12] But if this Court were to hold that increasing revenue is an illegitimate interest, such reasonable decisions would become immediately suspect.

Second, Petitioners' approach, if adopted, would impede the development of new and innovative tax policies. Although Petitioners purport to "challenge the consequences the City attached to [the November 1, 2005, cut-off date], not the setting of a date," Petrs. Br. 39, the reality is that the consequences they challenge—*i.e.*, the provision of prospective relief for taxpayers with outstanding debts that is not accompanied by corresponding refunds for payments previously made—are far from unique. Virtually any change in the tax code will impose new consequences on some taxpayers' past financial decisions, with the potential for differential outcomes that would have been unexpected at the time those decisions were made. Cf. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 515 (1986) ("[A] substantial portion of all statutes ... alter the value of prior investments simply because the future value of such investments will depend upon what

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[12] Similarly, a government might, for cost reasons, limit the availability of certain payment options depending on the size of a taxpayer's liability. Such limitations are common, including at the federal level. *See* Internal Revenue Serv., *Internal Revenue Manual* § 5.14.1.2 (June 1, 2010), http://www.irs.gov/irm/part5/irm_05-014-001.html (imposing liability thresholds for installment agreements).

rules are then in force."); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. Pa. L. Rev. 47, 57-58 (1977).

An equal protection doctrine that required governments to provide equal treatment in such circumstances would frustrate a wide range of tax reforms. Imagine, for instance, that a legislature wishes to introduce or expand a tax deduction for interest paid on student loans. If the new deduction applies only to interest paid after the law's effective date, then those taxpayers with debts still outstanding after that date will benefit from tax relief, but other taxpayers who already paid off identical debts will receive none. Or suppose a legislature seeking to generate new revenue decides to terminate an existing deduction, such as one for interest paid on a home mortgage. A taxpayer who just paid off a fifteen-year mortgage will be unaffected by the change, but a taxpayer who took out a mortgage for the same amount on the same day, but on a thirty-year repayment plan, will be adversely affected. In both cases, and in many other instances, taxpayers dissatisfied with the results could argue that the legislature attached consequences to an effective date that resulted in disparate taxation. If the ability of governments to differentiate between prospective and retrospective tax relief is called into question, legal changes such as these will become far more difficult to implement. Such a result would represent a sharp break from the historical latitude that this Court has given to governmental decisions regarding the temporal scope of tax reforms, *e.g.*, *Whitney* v. *State Tax Comm'n*, 309 U.S. 530, 541-42 (1940), and plunge legislative bodies into a sea of uncertainty regarding their ability to update their tax codes.

Petitioners' failure to account for the reality of implementing changes to the tax code also infects their analysis of this Court's precedent. Under their view, the tax relief at issue here is indistinguishable from the assessment practice struck down in *Allegheny Pittsburgh* because the government in both cases departed from a preexisting standard. Petrs. Br. 31-32. At issue in *Allegheny Pittsburgh*, however, was a standard for home valuation that was applicable at all relevant times and was advanced in no conceivable way by the challenged practice. 488 U.S. at 338-42; see *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 602-03 (2008). Here, in contrast, the purpose of the tax relief was to ease the transition from one taxation system to another, J.A. 75-76, and not to implement the policy goals of either system in isolation. Petitioners cite no case in which this Court has assessed the constitutionality of a transitional program by the degree to which it advanced the standards of the policy away from which it was transitioning, and the creation of such a rule here would erect a significant hurdle for any government that seeks to abandon an unpopular or ineffective tax program.

Third, if the forgiveness of outstanding taxes were to trigger concurrent obligations to refund prior taxes paid, tax forgiveness initiatives would become far more expensive for municipalities to implement—in some cases, prohibitively so. Affidavits submitted elsewhere by City officials make all too clear the reality that a municipality unable or unwilling to bear this added cost may simply decide to forgo tax relief altogether. See Defs.' Supp. Cross-Motion for Summ. J., Exhs. D, E, F, G, H (Dkt. No. 57), *Cox* v. *City of Indianapolis*, No. 09-0435 (S.D. Ind. Feb. 4, 2010).

Nor would the effects on tax forgiveness programs be limited to the particular facts at issue here. Governments frequently offer tax amnesty to those taxpayers with outstanding debts without also refunding taxes to those who already paid. Such relief may be offered to ease the transition to a new tax program. For example, in states that adopt the Streamlined Sales and Use Tax (a simplified multi-state tax plan that has been joined, to date, by twenty-four states), businesses that register with the program's online system are eligible for tax forgiveness, but refunds are not offered for businesses without taxes outstanding. See Streamlined Sales Tax Governing Bd., *Streamlined Sales and Use Tax Agreement* § 402 (amended Dec. 19, 2011), *available at* http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2012-19-11.pdf. Likewise, amnesty may be offered in the form of forgiven tax penalties for taxpayers who voluntarily disclose past noncompliance, without also providing refunds for penalties paid before the disclosure initiative was launched. See, *e.g.*, Internal Revenue Serv., *Voluntary Disclosure: Questions and Answers* (Feb. 9, 2011), http://www.irs.gov/newsroom/article/0,,id=210027,00.html (describing new voluntarily disclosure initiative for taxpayers with undisclosed foreign accounts).[13] If, as Petitioners urge, this Court were to erase the line between prospective relief and refunds, all of these programs would become subject to challenge.

Finally, if providing prospective relief to taxpayers on installment plans were to become prohibitively

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[13] Similarly, many municipalities offer amnesty for motorists with outstanding parking and traffic tickets, without also refunding tickets paid by similarly situated citizens. *See* Resp. Br. 39-40.

expensive, municipalities would find themselves forced to bear the administrative costs of collecting taxes they would have preferred to forgive—a lose-lose situation for governments and taxpayers. Indeed, had the relief at issue here not been extended, the City would have been left collecting taxes under some thirty-year installment plans for nearly twenty-nine years longer than desired. See Resp. Br. 28. A government contemplating such a potential outcome may very well conclude that the most prudent course is simply to withhold the option of extended payment plans altogether. That result should not and cannot be mandated by the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-161

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTINE ARMOUR, ET AL.,
Petitioners,

v.

CITY OF INDIANAPOLIS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders or remodelers, and its builder members are responsible for about 80 percent of all housing constructed each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated. NAHB has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by inequitable regulation under a wide

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Letters of consent to file this brief have been filed with the Clerk of the Court under Rule 37.3.

array of statutes and regulatory programs. *See* Appendix A.

NAHB's organization policies have long advocated that those affected must be able to challenge unconstitutional regulations and the fairness of their application. Central to this issue is the principle that identically situated property owners should be treated equally by municipal authorities. NAHB supports the ability of any property owner to challenge unconstitutional resolutions imposed on a property owner.

Furthermore, the taxing practices implemented in this case are of the nature and types that impose additional costs on the building trades, and in turn, upon housing. The toleration of arbitrary conduct by municipal authorities will result in higher housing costs as contractors, developers, lenders and insurers seek to protect themselves from such unpredictable contingencies. Therefore, unjustifiably expanding the range of rational basis justifications will ultimately eviscerate the Equal Protection Clause and lead to economic hardship for the building trades.

SUMMARY OF ARGUMENT

In the decision below, the Indiana Supreme Court unreasonably denied petitioners thousands of dollars in refunds awarded to their identically situated neighbors solely because petitioners had elected to pay assessments in full instead of in installments with interest. That holding conflicts with the "core concern" of the Equal Protection Clause; to act as a shield against arbitrary classifications. *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (per curiam).

This case involves not simply the unequal treatment of two similarly situated groups, but rather the unequal treatment of two *identical* groups without any acceptable rational basis or legitimate governmental purpose. The lower court failed to properly address the Equal Protection challenge raised by Petitioners and misapplied the legitimate interest standard applicable to rational basis review.

ARGUMENT

The Fourteenth Amendment "requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887). When it appears that an individual, or a class of individuals, is being singled out by government action, the Equal Protection Clause requires a rational basis for such disparate treatment. *Engquist*, 553 U.S. at 591. This case presents a

prime example of the unequal imposition of liability and the lack of rational basis therefor.

Admittedly, most laws differentiate in some fashion between classes of persons, but the Equal Protection Clause keeps governmental decision makers from treating alike persons differently. The lower court's determination that this case did not run afoul of Equal Protection ignores or misapplies the relevant legal authority.

To prevail on an equal protection claim, a plaintiff must demonstrate that she was treated differently than someone who is identical in all relevant respects. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("'Equal Protection' . . . emphasizes disparity in treatment by a [government actor] between classes of individuals whose situations are arguably indistinguishable"). The number of individuals in a class is immaterial for equal protection analysis. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The plaintiff must show that the defendant treated her differently, with no rational basis. *Id.*

In the Michigan Supreme Court decision of *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984), an identical fact pattern is illustrated. There, a state agency treated disparately those taxpayers who had paid assessments and those who had not. *Id.* at 843. The *Armco Steel* Court concluded that the "relevant class to be considered in analyzing the plaintiffs' equal protection challenge" is the whole group that was assessed the tax. *Id.* The court then held that it was contrary to the Equal

Protection Clause for the agency to subdivide that class into those who timely paid and those who did not, and then to forgive the unpaid assessments without extending a refund to the timely taxpayers. *Id.* at 843-44.

Such should be the holding here. The relevant class to be considered in analyzing the equal protection challenge is the whole group of 181 property owners subject to the Brisbane/Manning Barrett Law Sanitary Sewers Project and, subsequently, the STEP program and Resolution 101. This group includes not only Petitioners, but all Northern Estates property owners requiring septic upgrades. For Resolution 101 to then subdivide Petitioners (those property owners who had paid the identical assessment fee in full) from property owners paying the same assessment in installments with interest is contrary to the Equal Protection Clause. The Indiana Supreme Court has empowered the City to discriminate between two groups of property owners who are, in reality, but one class. This case provides the Court with the opportunity to correct the error, and prevent similar situations from occurring in the future.

The Fourteenth Amendment requires that all persons subjected to legislation be treated alike, under like circumstances and conditions, "both in the privileges conferred *and in the liabilities imposed*." *Hayes*, 120 U.S. at 71-72 (emphasis added). Here, the liability imposed on Petitioners was distinctly disparate when compared to all other property owners.

A state court's application of federal constitutional law to a decision regarding state legislation may be reversed by this Court if the state court misinterpreted or misapplied the relevant federal constitutional standard. *Contra Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981) (J. Stevens dissenting). Upon review of the ruling below, this Court should reverse the Indiana Supreme Court's holding as a misinterpretation of pertinent federal constitutional law.

I. THE LOWER COURT'S FINDINGS DO NOT SATISFY A RATIONAL BASIS REVIEW.

A. The Indiana Supreme Court's Holding That Resolution 101 Supports the Protection of Middle- and Low-Income Persons Fails to Address Petitioners' Equal Protection Challenge.

The Equal Protection Clause does not demand for purposes of rational-basis review that a governing decisionmaker actually articulate the purpose or rational supporting its classification. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). However, when the text of a law specifically declares its purpose, the law leaves no room to conceive of any other purpose for its existence. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959).

The Indiana Court of Appeals set out the full text of Resolution 101 in its order and reviewed it in detail. *City of Indianapolis v. Armour*, 918 N.E.2d

401, 406-07 (Ind. Ct. App. 2010).[2] The court found that Resolution 101 identified only one rationale for the City's decision to forgive outstanding Barrett Law assessments: "the transition from Barrett Law funding to STEP is in the best interests of middle- to lower-income property owners." *Id.* at 415. The Resolution is silent with respect to any consideration given the fully paid assessments.

The Indiana Supreme Court, similarly relying on the text of Resolution 101, identified the identical rationale for its enactment: to combat the financial imposition of the Barrett Law upon middle- to lower-income property owners. *City of Indianapolis v. Armour*, 946 N.E.2d 553, 562 (Ind. 2011). It, however, reached the opposite (unsupported) conclusion. There is no denying that the provision of support for citizens facing financial hardship is a legitimate interest, *see Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 108-09 (2003), but Petitioners' claims do not arise out of this rationale. Rather, they challenge the City's refusal to apply refunds to those property owners who had already paid their assessments in full. The court below fails to address this challenge head on.

Significantly, the singular rationale for Resolution 101 fails to address how the refusal to issue refunds

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[2] The appeals court also referenced an affidavit by the chairman of the city council board finding it instructive for determining the rationale underlying promulgation of Resolution 101. The affidavit, however, is silent as to the reasons for treating those who paid in full differently from those who financed.

combats the financial imposition on middle- to lower-income property owners. Moreover, neither the court below nor the factual record offers any explanation for why those who paid in a single payment deserve to be punished for their good-faith participation in a municipal initiative. As the Indiana Court of Appeals found, "the City has shown no nexus between the City's transition to STEP and its decision not to issue a refund" to Petitioners. *City of Indianapolis*, 918 N.E.2d at 415.

The Indiana Supreme Court, however, without addressing Petitioners' true challenge, found that Resolution 101 satisfies rational basis review because "support[ing] . . . citizens facing financial hardship is clearly a legitimate interest." *City of Indianapolis*, 946 N.E.2d at 562. It is unclear how the lower court concluded that the poor would have elected to pay installments with interest rather than avail themselves of some alternative source of funding. It is similarly unclear how the lower court reasoned that Resolution 101's forgiveness provision could prevail on rational basis review despite its failure to address the refund issue.

Finding a legitimate interest within the Resolution and going no further does not constitute the required review of the refund question under a rational-basis test. Nor does it comport with the established authority that the City, having made findings and declared its purpose in the Resolution, is foreclosed from offering other subsequent explanations. *See Allied Stores*, 358 U.S. at 530.

B. The Lower Court's Determination Has No Evidentiary Support.

The Indiana Supreme Court reasoned that it would have been reasonable for the City to believe that property owners who had paid their assessments in full were in better financial positions than those who chose installment plans. *City of Indianapolis*, 946 N.E.2d at 562. Not only does this reasoning find no factual support in the record, but it also goes too far; giving the court the power to find any remotely possible scenario sufficient to overcome rational basis review.

The lower court's use of *Clover Leaf Creamery* to support its reasoning is misplaced. 449 U.S. at 456. *Clover Leaf Creamery* stands for the proposition that parties challenging legislation under the Equal Protection Clause must introduce evidence supporting their claim that the legislation is irrational, and cannot prevail so long as it is evident from the legislature's consideration that the question is at least debatable. Specifically, "[w]here there [is] evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence . . . that the legislature was mistaken." *Id.* at 464.

The Indiana Supreme Court takes this proposition one step too far when, referencing *Clover Leaf Creamery*, it holds that "it does not matter . . . what the actual facts would show, . . . so long as the issue was at least debatable when the governmental

decision maker acted." *City of Indianapolis*, 946 N.E.2d at 562. *Clover Leaf Creamery* states that such a "debatable" question must be "evident from all the considerations presented to [the legislature]." 449 U.S. at 464. Here, no such "debatable" question is appropriate where there exists *no record* of such consideration before the legislature. Whether it was reasonable for the City to believe that Petitioners were in better financial positions may only form a legitimate basis when the facts before the legislature could have actually fueled such a debate. Where *no* facts exist, the court may not simply disregard what the "actual facts would show" and provide its own "debatable" question. Here the court sought to vault an even lower hurdle. It could only speculate on what the actual facts *might* show.[3]

In an equal protection case, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979) (collecting cases). This, however, requires legislative facts to exist in the first place.

In *Vance,* the Court upheld a mandatory retirement age for Foreign Service personnel against an Equal Protection challenge. *Id.* at 93. Writing a

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[3] The lower court took judicial notice of the Public Works Committee's October 20, 2005 Meeting Minutes as they constituted "legislative history" of Resolution 101. A plain reading of those minutes reveals that no one raised the issue of refunds, nor was it discussed.

dissenting opinion, Justice Marshall noted that the Court had closed its eyes to evidence against the mandatory retirement provision and incorrectly rested on the common-sense proposition that aging inevitably wears down older personnel. *Id.* at 120 (J. Marshall dissenting). Marshall wrote that "Absent any concrete evidence in the record . . . the Court is remitted to unsubstantiated assumptions." *Id.* at 121.

Such has occurred here. The Indiana Supreme Court has allowed the City, absent concrete evidence, to rely on the unsubstantiated assumption that Petitioners were in a better financial position to forgo refunds; though the neighborhood's socioeconomic divisions are the subject of speculation. The legislative facts on which this classification is apparently based could not rationally have been considered by the government decisionmaker. *See Nordlinger*, 505 U.S. at 11-12 (citations omitted).

The lower court, like the City, arbitrarily subdivided all property owners along (unsupported) financial capacity lines. Such assumptions have no support in the factual record and should be reversed.

C. There is No Basis in Law or Fact For The Indiana Supreme Court's Holding That Preservation of Limited Resources is a Legitimate Ground For Denial of Equal Protection.

As the final factor in its decision, the Indiana Supreme Court held that the preservation of limited public resources was a legitimate basis for not refunding Petitioners' assessments. This holding has no basis in law or fact.

The Indiana Supreme Court, collecting cases, held that minimizing administrative costs and the preservation of limited resources when granting benefits were legitimate interests. *See Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 511 (1937); *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Lyng v. Castillo*, 477 U.S. 635 (1986); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

A concern for the preservation of resources standing along, however, can "hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citing *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971)).

In *Plyler*, a Texas statute and school district policy excluded illegal aliens from public schools. 457 U.S. at 202. The Court held that the Texas statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents because there was

"no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy." *Id.* at 228.

Here, the Indiana Supreme Court's holding that "[t]he City clearly has a legitimate interest in not emptying its coffers to provide refunds" similarly has no evidentiary support. *City of Indianapolis,* 946 N.E.2d at 563. The record is silent as to whether refunds to Petitioners would impose any significant burden on the City's expenditures. Nor was Resolution 101 enacted with such an interest in mind.

Most disturbing is the unreasonableness of the 'preservation of resources' angle in consideration of the stark facts. For example, the City, while refusing to refund $273,391.63 to Petitioners, willingly forgave $1,240,313.74 in receivables owed.[4] To hold that the City had a legitimate interest in denying refunds amounting to less than twenty percent (20%) of the total amount in controversy is untenable.

As the lower court found, the transition to STEP and the enactment of Resolution 101 was designed so that lower connection fee and modest usage rates would permit more citizens' properties to be connected to the City's sewers, thereby alleviating the public health problem posed by septic tanks.

Resolution 101 was not enacted with the rationale of protecting municipal solvency from refund

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[4] Numbers extrapolated from factual record and decisions below.

disbursements; it was promulgated to encourage greater sewer connections. As the record reflects, it was not until Petitioners sought a refund of their assessments that the City denied such a request.

CONCLUSION

There is no sufficiently rational reason to treat two identical classes of property owners differently except for the fact that one group paid their assessment in full while the other elected the option of installments with interest. In fact, the Indiana Supreme Court's decision benefits those who choose not to promptly pay their taxes and should be reversed. *See Armco Steel*, 358 N.W.2d at 844 (explaining that in some states it is unconstitutional to benefit those people who chose not to pay their taxes promptly.).

DATED: January 5, 2012.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

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AMICUS CURIAE BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, *ET AL.*,

Petitioners,

v.

CITY OF INDIANAPOLIS, *ET AL.*,

Respondents.

On Writ Of Certiorari
To The Indiana Supreme Court

BRIEF OF NATIONAL TAXPAYERS UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The National Taxpayers Union ("NTU") is a nonprofit, nonpartisan membership organization founded by concerned taxpayers in 1969.[1] NTU's mission is to protect the interests of federal, state, and local taxpayers through public education, lobbying, and litigation on tax, spending, regulatory, and economic issues. NTU represents over 362,000 members in all fifty states, and it has frequently participated in matters in this Court. *See Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989); *see also, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *DIRECTV, Inc. v. Levin*, No. 10-1322 (petition for certiorari pending).

A fundamental purpose of NTU is challenging improper or illegal taxation on behalf of taxpayers who might otherwise face insurmountable hurdles to vindicating their rights. NTU has opposed efforts by state and local officials to erode restraints on their taxing authority, including both restraints imposed by citizens through ballot measures and the constitutional limitations imposed by the Equal

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Protection Clause. Based on NTU's experience in this area, it believes that this Court should reverse the Indiana Supreme Court's erroneous decision to permit a local taxing authority to withhold tax refunds from those who paid their tax assessments in full while forgiving the tax obligations of otherwise identically situated taxpayers who chose to pay in installments.

SUMMARY OF ARGUMENT

The decision of the Indiana Supreme Court is irreconcilable with *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989), which reaffirmed that the Equal Protection Clause "'protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.'" *Id.* at 345 (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). As this Court explained in *Allegheny Pittsburgh*, the Constitution requires "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," and disparate tax burdens must be "reasonable" and related to a legitimate government interest. *Id.* at 343.

Contrary to the suggestion of the Indiana Supreme Court, *Nordlinger v. Hahn*, 505 U.S. 1 (1992), did not change the constitutional requirement that there be a rational basis for unequal tax treatment. In *Nordlinger*, this Court held that California had a rational basis for assessing real property based on the value at the time of acquisition instead of current market value. Unlike in *Allegheny Pittsburgh*, where state law conflicted with the purpose underlying an acquisition-value taxation

scheme, state law did not pose any such conflict in *Nordlinger*. *See id.* at 14-16. This distinction in background state law is crucial. The reasonableness of a tax imposed by a taxing authority is particularly suspect if it conflicts with a policy embodied in the governing state law.

Here, the City of Indianapolis imposed enormously unequal tax burdens—by a factor of 10 to 30 times—on taxpayers who are identically situated in every way but one: The City forgave the outstanding tax liability of taxpayers who paid in installments, while refusing to refund any taxes paid by those who had already paid in full. Such irrational and discriminatory treatment is not reasonably related to any legitimate government interest that the City has articulated and cannot be squared with *Allegheny Pittsburgh*. Moreover, the rationales for differential taxation accepted by the court—preservation of the City's resources, purported administrative convenience, and the supposition that those who paid in full were in a better financial position than those who paid in installments—are unfounded. This Court has rejected the notion that an interest in maximizing government resources excuses unconstitutional treatment; there is no serious administrative inconvenience involved in refunding tax payments made by those who paid in full; and there is no evidence that the City actually considered the financial status of those who paid in full other than as a *post hoc* rationale developed in litigation. Moreover, the latter purpose would conflict with Indiana law, just as a purpose of tax inequality conflicted with state law in *Allegheny Pittsburgh*.

Finally, the unequal taxation here creates a clear injustice based on its retroactive undermining of the legitimate expectations of taxpayers. Specifically, the City's approach disfavors taxpayers who relied on the state law requiring equal taxation and who acted in a manner they believed to be responsible by paying their taxes immediately. As this Court has long recognized, such retroactive effects raise serious constitutional concerns on due process, takings, and equal protection grounds. Regardless of the particular doctrinal category, this Court has viewed such retroactive efforts skeptically because of their potential for extreme injustice and for harm to the rule of law. Moreover, if taxpayers know that the government can retroactively favor those who pay in installments over those who paid in full, informed taxpayers will virtually always choose the former—and governments across the country will lose the ability to provide this option without sacrificing virtually all up-front tax payments.

In sum, this Court should reverse the judgment of the court below and reaffirm the validity of *Allegheny Pittsburgh*'s requirement of a rational basis for unequal taxation. NTU believes the proper course is for all affected taxpayers to receive refunds of past payments and forgiveness of future payments, regardless of whether their overpayment was made in a single lump sum or in installments.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE PROHIBITS UNEQUAL TAX TREATMENT NOT SUPPORTED BY A RATIONAL BASIS.

A. *Allegheny Pittsburgh* requires a rational basis for unequal tax treatment, and *Nordlinger* did not lessen this requirement.

This Court's unanimous decision in *Allegheny Pittsburgh* reaffirmed that disparate tax treatment of similarly situated taxpayers must have a rational basis—a requirement that is exceptionally difficult to satisfy if the purported basis for unequal treatment is inconsistent with policies embodied in state law. The court below concluded that *Nordlinger* limited *Allegheny Pittsburgh* to its precise facts, making the latter essentially worthless as precedent. This approach—which conflicts with this Court's own explanation of its decisions in *Nordlinger*—is wrong.

In *Allegheny Pittsburgh*, this Court held that a county's practice that "resulted in gross disparities in the assessed value of generally comparable property," and thus in the tax imposed on comparable property, violated the Equal Protection Clause. 488 U.S. at 338. The county tax assessor valued property based on its purchase price, while making only minor modifications in the assessments of land that had not been sold recently. *See id.* As a result, the petitioner "was assessed and taxed at approximately 35 times the rate applied to owners of comparable properties." *Id.* at 341. This Court recognized that a "State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable," but held that "West Virginia has not drawn such a distinction."

Id. at 344-45. Indeed, this Court stressed that West Virginia's differential tax burden was even inconsistent with the State's constitution, which "provide[d] that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value." *Id.* at 345.

Three years later, in *Nordlinger*, 505 U.S. 1, this Court rejected an equal protection challenge to an amendment to the California Constitution whereby "[r]eal property is assessed at values related to the value of the property at the time it is acquired by the taxpayer rather than to the value it has in the current real estate market." *Id.* at 5.[2] The effect of this "acquisition-value" system of taxation was that "longer term property owners pay lower property taxes reflecting historic property values, while newer owners pay higher property taxes reflecting more recent values." *Id.* at 6. This Court held that "[t]he appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest." *Id.* at 11. Specifically, "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (internal citations omitted). The Court held that

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[2] NTU actively supported enactment of the California constitutional amendment (Article XIIIA) at issue in *Nordlinger*.

there were "at least two rational or reasonable considerations" justifying the differential treatment: (1) "the State has a legitimate interest in local neighborhood preservation, continuity, and stability"; and (2) "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12.

This Court explained that the "obvious and critical factual difference between [*Nordlinger*] and *Allegheny Pittsburgh* is the absence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could *conceivably* have been the purpose for the Webster County tax assessor's unequal assessment scheme," since the terms of the state constitution required market-value assessments. *Id.* at 14-15 (emphasis added). In short, rational basis review "require[s] that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker"; and, in *Allegheny Pittsburgh*, "the facts precluded any plausible inference that the reason for the unequal assessment practice was," in fact, "to achieve the [purported] benefits of an acquisition-value tax scheme." *Id.* at 15-16 (internal quotation marks omitted); *see also Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 109-10 (2003).

B. A taxing authority's justification for differential taxation that is at odds with a policy embodied in state law is necessarily suspect.

As noted, *Allegheny Pittsburgh* and *Nordlinger* reaffirm the significance of background state-law principles in assessing the constitutionality of differential taxation. When—as in *Allegheny Pittsburgh* and in this case—the purported purpose underlying differential taxation is at odds with the policy embodied in state law, it is highly suspect whether the taxing authority's articulated objective is, in fact, a legitimate ground for unequal treatment. *Allegheny Pittsburgh*, 488 U.S. at 345. This conclusion, which gives meaning to both *Allegheny Pittsburgh* and *Nordlinger*, also draws support, by analogy, from other areas of law.

First, policy choices embodied in state law are made through the democratic process and, if unpopular, can be changed through that process. However, a particular instance of taxation does not reflect the democratic process if the only rationale proffered for it conflicts with state law governing tax policy. For instance, in *Allegheny Pittsburgh*, the "welcome stranger" approach allowed local tax assessors to curry favor with long-time residents, while heavily taxing new property owners who would have no idea that they would bear the extra tax burden—and no way of knowing since state law said otherwise. Thus, the tax in *Allegheny Pittsburgh* was particularly suspect because it allowed officials to achieve wealth transfers "with relative invisibility and thus relative immunity from normal democratic processes." *Pennell v. City of San Jose*, 485 U.S. 1, 22

(1988) (Scalia, J., concurring in part and dissenting in part). On the other hand, the "welcome stranger" approach at issue in *Nordlinger* was a consequence of Article XIIIA of the California Constitution, which was proposed by citizen initiative and enacted by voters after due consideration.

Second, the significance of background state-law principles here draws support from administrative law. This Court recently reaffirmed that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.* While an agency "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," it must do so "when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* Similar logic applies to the "rational basis" standard for equal protection purposes: While the government can change its position, an unexplained inconsistency raises doubts about the rationality of government action.

C. The Indiana Supreme Court's explanations for discarding the principles of *Allegheny Pittsburgh* are meritless.

Instead of accepting this Court's own explanation of why *Allegheny Pittsburgh* remained good law after *Nordlinger*, and continues to require a rational basis for the unequal taxation of similarly situated taxpayers, the court below discarded *Allegheny*

Pittsburgh altogether. It provided three grounds for doing so, none of which withstands scrutiny.

First, the court below held that "*Allegheny Pittsburgh* has essentially been narrowed to its facts." *City of Indianapolis v. Armour*, 946 N.E.2d 553, 568 (Ind. 2011). However, nothing in *Nordlinger* or any other decision by this Court suggests that *Allegheny Pittsburgh* should be read so narrowly. Indeed, *Nordlinger* accepted the principles of *Allegheny Pittsburgh*, and held simply that a rational basis was present in one case but not in the other.

Second, the court below reasoned that *Allegheny Pittsburgh* was inapposite because it was purportedly "a class-of-one case—a tax policy directed at a particular taxpayer." *Id.* The court cited no language in *Allegheny Pittsburgh* or *Nordlinger* supporting the idea that *Allegheny Pittsburgh* applies only to a "class-of-one" case. In any event, as this Court has explained, the designation as a "class-of-one" case "is of no consequence because . . . the number of individuals in a class is immaterial for equal protection analysis." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (per curiam). Likewise, the suggestion by the court below that "animus or ill-will toward the plaintiffs" is a *de facto* requirement for a class-of-one equal protection violation, *see City of Indianapolis*, 946 N.E.2d at 565, has no basis in precedent. Indeed, if *Allegheny Pittsburgh* were a class-of-one case, it would belie any such suggestion, because no such finding of animus existed there.

Third, the court below observed that *Allegheny Pittsburgh* "has been criticized by at least one Justice on the Supreme Court and by scholars." *City of Indianapolis*, 946 N.E.2d at 568 (citing *Nordlinger*,

505 U.S. at 18-28 (Thomas, J., concurring in part and concurring in the judgment); William C. Cohen, *State Law in Equality Clothing: A Comment on* Allegheny Pittsburgh Coal Company v. County Commission, 38 UCLA L. REV. 87, 104 (1990); Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 263 (1990)). Justice Thomas's separate opinion in *Nordlinger* stated that this Court's discussion of *Allegheny Pittsburgh* was incorrect because "[a] violation of state law does not by itself constitute a violation of the Federal Constitution." 505 U.S. at 26 (Thomas, J., concurring in part and concurring in the judgment). Of course, the seven Justices in the *Nordlinger* majority were well aware of, but not persuaded by, Justice Thomas's criticism. In any event, the question for purposes of equal protection, to be sure, is not simply whether the tax violates state law. But a taxing authority's defense of differential tax treatment still must be assessed against the tax policy that the State itself has enacted. Indeed, the legitimacy and rationality of any supposed rationale for differential taxation are, at a minimum, suspect if state law forecloses the tax authority's proffered purpose.

II. THE UNEQUAL TAX AT ISSUE HERE IS PLAINLY IRRATIONAL AND CONFLICTS WITH STATE LAW.

A. The City's purported justifications for the tax do not withstand even the barest scrutiny and conflict with state law.

The City has offered no rational or legally sufficient justification for its disparate treatment of similarly situated taxpayers. Under the City's approach, those taxpayers who paid in a lump sum

(and from whom the City withheld a refund) paid between 10 and 30 times more than their next-door neighbors who had chosen to pay over time. Pet. App. 69a. The imposition of such "gross[ly] disparat[e]" taxes on similarly situated taxpayers violates the Equal Protection Clause. *See Allegheny Pittsburgh*, 488 U.S. at 338, 341 (invalidating tax that imposed a burden on petitioner of "approximately 35 times the rate applied to owners of comparable properties").

The court below reasoned that administrative convenience and preservation of resources are legitimate bases for this gross inequity in taxing otherwise similar taxpayers. *See City of Indianapolis*, 946 N.E.2d at 560, 563-64. Moreover, it held that an unsupported supposition of different income levels could support different taxes, even absent any evidence that the City actually considered this possibility before litigation, and even in the face of state law to the contrary. *Id.* at 562. The City has made the same income-based argument in litigation, and has put forward in an affidavit "[t]he administrative costs to service and process remaining balances on Barrett Law accounts" as a basis for its decision. JA76. [3] If accepted, these *post hoc* justifications would signify that *Allegheny Pittsburgh* provides virtually no limit on tax decisions.

First, the preservation of resources might explain the total amount by which the City reduced the tax burden on its residents, but not the unequal

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[3] The City's other explanations in the affidavit concern the City's choice to forego the Barrett Law funding system, but not the decision to favor those who decided to pay in installments over those who paid in full. *See* JA75-76.

approach used by the City, *i.e.*, the choice to draw the line between those who paid fully and those who did not. Indeed, as this Court has made clear, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *see also Williams v. Vermont*, 472 U.S. 14, 25 (1985) (rejecting the argument that "the simple desire to raise funds" justifies differential tax treatment).

Second, administrative convenience is even more nonsensical a justification, because refunding taxes to those who paid in full would involve only basic arithmetic. Furthermore, in the long run, the City's approach might well produce greater administrative costs because more taxpayers—now knowing that the government can disfavor those who pay in full—will pay in installments if that option is offered in the future.

Third, the only other explanation offered by the court below is that "it was reasonable for the City to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans." 946 N.E.2d at 562. But there is no evidence that the City actually considered this possibility prior to litigation. *See id.* at 572 (Rucker, J., dissenting). As *Nordlinger* explained, "the Equal Protection Clause is satisfied so long as . . . the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." *Nordlinger*, 505 U.S. at 11. In other words, for purposes of the rational basis test, courts must accept the government's explanation only if the

government actually considered some facts in the first place. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("*Where there was evidence* before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.") (emphasis added). Particularly absent *any* record evidence put forth by the City regarding *any* of the taxpayers who delayed payment or those who paid in full, *see Cox v. City of Indianapolis*, No. 1:09–cv–435–WTL–DML, 2010 WL 2484620, at *4 (S.D. Ind. June 14, 2010), there is nothing to show that this rationale was reasonably or conceivably the City's purpose.

In any event, as in *Allegheny Pittsburgh*, the rationale offered by the City in litigation is contrary to state law. The tax was imposed pursuant to Indiana's Barrett Law, which required taxes to be "apportioned equally among all abutting lands or lots." Ind. Code § 36-9-39-15. The City simply reduced the taxes imposed under this law. However, this reduction was given only to the taxpayers who had chosen to pay by installment. As a result, the taxes were not apportioned equally, as required by law. Indeed, even the new tax scheme that replaced the Barrett Law system—and provided the reason for the tax reduction—does not purport to take income or "financial position" into account in the amount of taxation. *City of Indianapolis*, 946 N.E.2d at 557 n.5. Rather, it mandates a flat $2,500 fee (along with a monthly sewer bill) for all property owners adjacent to new sewer construction projects. *Id.* Furthermore, the Indiana Constitution requires equal taxation based on the value of the property. *See* Ind. Const.

Art. 10, § 1 ("The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."). Thus, the supposed purpose of taxing based on financial position was contrary to state law, just as a purpose of unequal taxation in *Allegheny Pittsburgh* was contrary to state law mandating uniform rates. 488 U.S. at 345.

B. The City's differential treatment based on whether a taxpayer has chosen to pay in full or over time is manifestly unjust and raises serious retroactivity concerns.

The taxpayers who paid their assessments in full did so on the basis of a law stating that they would have to pay just as much (plus interest, *see* Ind. Code § 36-9-37-8.5(e)) if they paid in installments. The City then changed the rules of the game retroactively. And it did so in a manner that imposed a burden on the taxpayers who took the most responsibility—by paying their tax bill as soon as possible—of 10 to 30 times that imposed on their neighbors who chose to pay in installments. Pet. App. 69a. The retroactive nature of the City's actions raises additional constitutional concerns.

This Court has been skeptical of retroactive laws that cause clearly unfair results. "Retroactivity is generally disfavored in the law, in accordance with fundamental notions of justice that have been recognized throughout history." *E. Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality opinion; internal quotation marks and citation omitted); *see also id.* at 547 (Kennedy, J., concurring in part, dissenting in

part) ("As today's plurality opinion notes, for centuries our law has harbored a singular distrust of retroactive statutes."); *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself."). Moreover, the unfairness that can accompany retroactivity is particularly problematic: "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 503 U. S. 181, 191 (1992).

This Court directly addressed retroactivity in the tax context in *United States v. Carlton*, 512 U.S. 26 (1994). There, the Court held that a retroactive change to the rules for certain tax deductions did not violate due process, but recognized that retroactive tax changes receive significant scrutiny. Specifically, "the validity of a retroactive tax provision under the Due Process Clause depends upon whether retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 30; *see also id.* at 31 ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects . . . by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose" (internal quotation marks omitted)). In *Carlton*, "Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary" because the amendment "was adopted as a curative measure," the change affected "those who had made purely tax-motivated stock transfers," and

"Congress acted promptly and established only a modest period of retroactivity." *Id.* at 31, 32.

Applying similar principles in *Eastern Enterprises*, this Court invalidated a statute requiring a company that formerly participated in the coal industry to fund health benefits for retired miners who had worked for the company decades earlier. The plurality reasoned that the statute effected an unconstitutional taking: Because the statute "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." 524 U.S. at 537. Justice Kennedy reached the same conclusion on due process grounds. *See id.* at 548-49 ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."); *see also Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104, 124 (1978) (In deciding whether the Takings Clause "require[s] that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," one relevant factor is "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . .").

This recognition of the dangers of retroactivity for takings and due process purposes likewise applies to the guarantee of equal protection. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), invalidated on equal protection grounds a state law providing a tax exemption for Vietnam veterans who had been state residents before 1976, but not to more recent arrivals. The Court reasoned that "[t]his discrimination on the basis of residence is not supported by any identifiable state interest," and that "[n]either the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit." *Id.* at 623. In short, it is one thing for the government to change the rules under clear, limited circumstances; it is quite another for the government to do so with no legitimate justification for how it separates the retroactive winners and losers. Here, the choice of winners and losers is plainly unjust, and, as discussed above, the City presents no rational justification for it.

Finally, if this Court were to accept the government's ability to retroactively disfavor those taxpayers who paid in full, it would not only unfairly harm those taxpayers, but it would also effectively limit the flexibility of state and local governments across the country. Prior to the instant case, every state supreme court to address the issue had held that differential tax refunds or tax forgiveness could not be based on whether the tax payment was made in full. *See, e.g.*, *State ex rel. Stephan v. Parrish*, 891 P.2d 445, 457 (Kan. 1995); *Armco Steel Corp. v. Dep't of Treasury*, 358 N.W.2d 839 (Mich. 1984); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969);

Richey v. Wells, 166 So. 817, 819 (Fla. 1936). The Indiana Supreme Court's decision now calls that principle into doubt. If upheld, the government's ability to provide the option of paying up front or in full would be severely hampered. Most people would be aware of the possibility of government changing the rules to favor those paying in installments, and, understandably, very few would pay up front.

The consequences of this change would affect governments across the country, which in numerous situations give taxpayers the option to pay in installments or in a lump sum. *See, e.g.*, S.C. Code § 12-45-75 ("The governing body of a county may by ordinance allow each taxpayer owning a parcel of taxable real property within the county the option to pay property taxes in installments . . . ."); Ky. Rev. Stat. § 141.305 ("Installment payments of estimated tax."); St. Louis County Revenue, Property Tax Installment Payment Program, *available at* http://revenue.stlouisco.com/collection/PropertyTaxInstallmentPaymentProgram.pdf ("To be eligible for the prepayment installment program, . . . [t]he total tax billed amount, based on last year's taxes, must be a minimum of $100 . . . ."); Lee County, Fla., Installment Payment Plan, *available at* http://www.leetc.com/taxes.asp?page_id=txinstallplan ("Property taxes can be paid by the installment method if the prior year's real estate or tangible tax bill is more than $100."). The benefit of such a system is that the government receives some money quickly, but does so without forcing people to pay their entire tax bill at once. But if almost no one pays up front, then the government may only be able to obtain certain resources by forcing everyone to pay

right away, which may be politically infeasible for the government or practically infeasible for the taxpayers.

CONCLUSION

For the foregoing reasons, the judgment of the Indiana Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-161

IN THE

Supreme Court of the United States

CHRISTINE ARMOUR, ET AL.,

Petitioners,

v.

CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Respondents.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who have paid their assessments in full, while forgiving the obligations of identically situated taxpayers who chose to pay over a multi-year installment plan.

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INTEREST OF THE *AMICUS CURIAE*

The Tax Foundation submits this brief as *amicus curiae* in support of Petitioners in the above-captioned matter. [1]

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for Petitioners and Respondents were timely notified of *amicus curiae*'s intent to file and their written consent have been obtained and filed with the Clerk of the Court.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., we seek to make information about government finance more understandable and accessible to the general public. Our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

This Court's decision will provide guidance on the line between states' power to shape their tax systems and discriminatory taxation forbidden by the Equal Protection Clause. Because this Court's decision may be looked to as authority by other courts analyzing whether specific state tax practices violate the Equal Protection, the Tax Foundation has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

The divided decision of the court below sustained an arbitrary tax policy that is problematic both for constitutional reasons and practical reasons. Unless reversed, taxpayers across the United States will have less certainty with which to make effective financial decisions. This Court should take the opportunity to forestall future disputes by providing basic guidance to government officials on the importance of equal tax refund treatment of taxpayers in the same class. By doing so, this Court will promote an efficient and beneficial legal climate for individual and business taxpayers alike.

ARGUMENT

I. THIS COURT SHOULD TAKE THE OPPORTUNITY TO RESTRICT ARBITRARY AND IRRATIONAL STATE REFUND PRACTICES.

A. The City's Actions in This Case are Arbitrary and Irrational.

The conflict in this case arose when the Indianapolis city government changed its sewer tax, under which taxpayers had to pay $9,278 either (1) in full, up front or (2) by installment over 10, 20, or 30 years. One year later, the City changed the tax structure going forward and forgave the outstanding payments of all taxpayers who were paying the tax in installments. Taxpayers who had paid in full, including Petitioners, requested a *pro rata* refund of their up front payment, but the City refused. The taxpayers then initiated this suit, alleging a violation of the Equal Protection Clause. The trial court and Indiana Court of Appeals agreed with Petitioners, but a divided Indiana Supreme Court reversed in a 3-2 decision.

The Equal Protection Clause of the Fourteenth Amendment does not require states to "maintain a precise, scientific uniformity with reference to composition, use, or value." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959). State sovereignty allows state governments to impose various taxes at different rates on certain entities to raise revenue. *See id.* at 526-27. States, however, cannot treat taxpayers unequally *carte blanche*. *See, e.g., id.* at 527, *citing F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920)

("The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification 'must upon some ground of difference having a fair and substantial relation to the object of the legislation.").

The City has sought to justify its unequal refund policy treatment of otherwise identically classified homeowners by pointing to its interest in relief for the poor, administrative convenience, and conservation of funds. *See City of Indianapolis v. Armour*, 946 N.E.2d 553, 560 (Ind. 2011). These *post hoc* rationalizations do not bear out. The disparate tax refund treatment does not benefit poor taxpayers exclusively or even primarily; if poor taxpayers do benefit disproportionately, it is only by chance. The other considerations are so broad and encompassing that, if upheld, there would then be no Equal Protection limitations on discriminatory government policy.

The decision of the court below failed to evaluate the City's stated justifications adequately. The court should have identified a rational link between (1) the social goal of providing the less fortunate with tax relief, administrative convenience, or conservation of funds to (2) the act of denying refunds to certain taxpayers while waiving obligations of others. Instead, the court below merely found the justifications legitimate in the abstract, concluding that this justifies the City's policy of treating pay-in-full taxpayers disparately than pay-in-installments taxpayers. *See id.* at 562-63.

The two dissenting judges in the decision below correctly noted that there was "nothing to explain

why the City treated differently residents who elected to pay their assessments in a lump sum versus those who elected to pay in installments" and that "'[t]he stated purpose in Resolution 101 simply fails to express any connection to the" denial of relief to petitioners.'" *Id.* at 570-71 (Rucker, J., dissenting).

Distressingly, the reasoning of the court below is broad enough to extinguish any Equal Protection claim on arbitrary policy. The governmental interests of not incurring the costs of disgorging improperly held funds or processing refunds to rightful owners could be invoked in any legal case. To reach this conclusion, the court below selectively cited this Court's precedents to suggest that the "rational basis" test is no limit on arbitrary governmental actions. *See, e.g., id.* at 561, *citing FCC. v. Beach Communications, Inc.*, 508 U.S. 307, 15 (1993) ("[I]t does not matter what the actual policy reason was, so long as a legitimate reason can be conceived."); *id.* at 561, *citing Nordlinger v. Hahn*, 505 U.S. 1, 15-16 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959) ("[A] policy reason is sufficiently plausible if it 'may reasonably have been the purpose and policy' of the relevant government decisionmaker.").

This reasoning by the court below is disconcerting because it could conceivably uphold any governmental action justified by administrative cost concerns. The scope of discretion that the court below gave the City government signals that any violation of the Equal Protection Clause is permissible if the authorities claim there is a governmental interest in the violation.

Courts in other states have determined that selective tax treatment such as at issue in this case violates equal protection guarantees. *See, e.g., Gosnell Development Corp. v. Arizona Dep't of Revenue*, 744 P.2d 451, 453 (Ariz. Ct. App. 1987) ("Under well-settled Arizona and federal law, taxing authorities treating taxpayers in the same class differently, as Gosnell has been treated, violate their rights to equal protection under the law."); *Armco Steel Corp. v. Dep't of the Treasury*, 358 N.W.2d 839, 243 (Mich. 1984) (citing *Beauty Built Construction Co. v. City of Warren*, 134 N.W. 2d 214, 236 (Mich. 1965)) ("Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions."); *Washington Theatre Club, Inc., v. District of Columbia*, 311 A.2d 492, 495 (D.C. 1973) ("[I]f there is no substantial difference between the operation of these two organizations, [granting only one organization a tax exemption] would amount to an unfair denial of equal tax treatment to appellant."); *Perk v. City of Euclid*, 244 N.E.2d 475, 477 (Ohio 1969) ("A statute which confers special benefits upon delinquent taxpayers not equally available to nondelinquent taxpayers violates Section 2 of Article I of the constitution of Ohio [promising equal protection to its citizens] and is therefore void and of no effect."). These cases conclude that arbitrary tax classifications resulting in unequal treatment violate constitutional protections. This Court should look to these cases as persuasive in

interpreting the applicability of the Fourteenth Amendment to the City's action in this case.

B. If Allowed to Stand, the Decision of the Court Below Will Undermine Business Certainty, Tax Compliance, and Respect for the Law.

The Indiana Supreme Court's decision below has negative implications for not only the petitioners in the instant case, but also unforeseen numbers of other taxpayers. Individual taxpayers must use scarce resources and time educating themselves about and complying with applicable tax laws, and business taxpayers face even greater compliance costs because tax laws, especially at the local level, change often. This holds true especially for individuals and companies with a tax obligation in multiple states: they have many local, state, and federal tax laws to obey. When governments act arbitrarily in their tax procedures, these scarce resources must be allocated to cumbersome compliance procedures. Without the ability to make reasonable predictions about tax climates and resource allocation, making important business decisions becomes more difficult and reducing business activity.

While the taxpayers in the instant case were all individual taxpayers, the decision of the court below effectively encourages unpredictable and arbitrarily targeted tax policy. Taxpayers are effectively taught that they should pay their taxes in installments whenever possible because they may "lose" less money than those who pay in full. Moreover, taxpayers who can afford to pay in full have even greater incentive to pay in installments, a decision

made not for economic reasons but due to an uncertain legal climate.

The decision below emphasized that tax authorities can use taxpayers' probable economic statuses as a justification for arbitrary tax policy, a dangerous precedent. State revenue officials already often claim that their constitutionally questionable actions are justified by budget concerns. If the decision of the court below stands, they will be encouraged to push the limits even further. *See, e.g.*, Paul Frankel, *Retroactivity and Retained Refunds*, TAX FOUNDATION TAX POLICY PODCAST (Jul. 7, 2010), http://www.taxfoundation.org/research/show/26493.html (explaining government proclivities towards citing governmental interests in questionable ways).

The instant case is not an aberration in showing little regard for business certainty and scarce resources. In *Zoeller v. Aisin USA Manufacturing, Inc.*, 946 N.E.2d 1148 (Ind. 2011), the Indiana Supreme Court upheld outrageous state tax refund policy. In that case, the Indiana Department of Revenue sent a taxpayer an overpayment but later determined that their issuance of the refund was a clerical error. The Department proceeded to send out a series of notifications that cancelled the assessment, re-issued it, and altered the amount due, all after the statute of limitations had already passed. The Indiana Supreme Court determined that the Department of Revenue had been acting within the statute of limitations because the case did not technically concern taxation but instead refunds. Decisions such as *Zoeller* and the instant case suggest that some state officials are concerned neither with protecting taxpayers' rights nor with

encouraging taxpayers to engage in productive economic activities. This in turn makes it less likely that taxpayers will feel that they are represented faithfully by their government.

For many citizens, paying taxes is one of the few ways that they interact with the government. Tax policy widely perceived as unusual and unfair threatens to foster a general disenchantment with the government, creating tensions between the law and citizens. By reiterating basic standards of equal refund treatment of a canceled tax, this Court will reduce the prevalence of a rising problem of arbitrary taxation practices.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Tax Foundation respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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